Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

COWBOY AUTO SALES, INC. and BRUCE WILLIAMS,

Petitioners,

v.

WILSON HALWOOD, JR. and LORENA HALWOOD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals of the State of New Mexico wrongly concluded that the Navajo Nation Chinle District Court in Arizona possesses jurisdiction to impose punitive damages on a nonmember, non-Indian, New Mexico citizen?

2. Whether judicial review encompasses the power claimed by the Court of Appeals of the State of New Mexico to interpret 28 U.S.C. § 1738 and Art. IV, Sec. 1 of the United States Constitution to alter its grant of legislative jurisdiction to hold that the Navajo Nation Indian reservation is a separate territory of the United States which requires the extension of full faith and credit to a Navajo tribal court judgment from Arizona?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico in this case.

OPINIONS BELOW

On April 30, 1997, the Court of Appeals entered its first order. The petitioner filed the first Motion for Rehearing on May 8, 1997. The Court of Appeals issued its second opinion on May 20, 1997. App. 9. Due to an error in the Clerk's Office from the computer conversion, Respondent did not receive a copy of this opinion until June 17, 1997. Respondent-Petitioner then filed an Untimely Motion For An Extension of Time to File Motion for Rehearing which was granted. The petitioner then filed a second Motion for Rehearing on June 30, 1997. This Motion was denied by order entered July 29, 1997. App. 8. The New Mexico Supreme Court denied certiorari on September 24, 1997. App. 44. A motion for rehearing was filed based on the Ninth Circuit decision of *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1516 (1998) which was denied on October 10, 1997. App. 6. A second motion to dismiss was filed in the trial court on November 19, 1997 for lack of subject matter jurisdiction of the New Mexico courts. The trial court denied the motion sua sponte on November 20, 1997 and the present appeal followed. App. 4.

JURISDICTION

The Court of Appeals of the State of New Mexico issued its memorandum order July 8, 1998. App. 1. The Supreme Court of New Mexico denied the petition for writ of certiorari on August 24, 1998. App. 44. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, the Full Faith and Credit Clause, Art. IV, Sec. 1 and 28 U.S.C. § 1738.

STATEMENT OF THE CASE

This case began on January 27, 1992 (App. 29) with a default judgment entered against Petitioners in the Navajo Nation Chinle District Court in Arizona for repossessing a car worth $500 in Chinle, Arizona. The Navajo judgment awarded $3,000 actual damages, $1,000 trespass damages, statutory damages of $425.10, costs of $43.55, $1,620 for attorney fees and $25,000 in punitive damages. The Navajo District Court entered the punitive damages as part of its default judgment without any presentation of evidence. The Navajo default judgment was filed as a New Mexico foreign judgment on November 8, 1995.

Petitioners filed a motion to dismiss claiming that the punitive damages are beyond the jurisdiction of the Navajo Nation courts citing *Oliphant v. Susquamish Tribes*,

435 U.S. 191 (1978). The general civil jurisdiction of the Navajo Nation courts was not contested. The trial court granted the Navajo judgment full faith and credit under *Jim v. C.I.T. Financial Services Corporation*, 87 N.M. 362, 533 P.2d 751 (1975) but ruled that the Navajo Court lacked jurisdiction to impose punitive damages because of their penal nature based upon its interpretation of *Oliphant*. App. 26. The Halwoods appealed the issue of the jurisdiction of the Navajo Courts to impose punitive damages on nonmembers.

The basic argument on appeal was that under a full faith and credit analysis, the New Mexico courts had no authority or duty to review the jurisdiction of the Navajo Nation courts. This position was vigorously contested by Petitioners because of the civil rights and federalism consequences. Petitioners relied primarily on *Oliphant*, *Duro v. Reina*, 495 U.S. 676 (1990) and *Montana v. United States*, 450 U.S. 544 (1981) to argue that New Mexico should overrule *Jim v. C.I.T. Financial Services* and apply a comity analysis. The position of Petitioners was that Indian tribes do not have the power to punish nonmembers of the tribe. The New Mexico Court of Appeals not only disagreed with Petitioners but extended the holding from *Jim v. C.I.T. Financial Services*.

Because the first Court of Appeals opinion relied on language from *Iowa Mutual v. LaPlante*, 480 U.S. 9 (1987) which was expressly disavowed in *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997), Petitioners filed their first Motion for Rehearing. Instead of reconsidering their opinion, the Court of Appeals interpreted the new ruling of *Strate* into their analysis that federal law required full faith and credit. *See Halwood v. Cowboy Auto Sales*, 124

N.M. 77, 946 P.2d 1088 (Ct.App. 1997). App. 9. The opinion is extreme in absolutely requiring full faith and credit by destroying the doctrine of comity. Judge Bosson's concurring opinion tactfully questioned whether this was actually what the federal law requires. Of course, the United States Supreme Court has never directly addressed the application of 28 U.S.C. § 1738 to Indian tribal court judgments.

Petitioners then petitioned the New Mexico Supreme Court to overturn the Court of Appeals opinion entered May 20, 1997 and argued that what began as a question of the Navajo Nation tribal court's jurisdiction to impose punitive damages against a nonmember had expanded into a direct confrontation with the federalism decisions of the highest court. The New Mexico Supreme Court granted itself an extension for review of the petition but denied it September 24, 1998. Petitioners were granted leave to file a Motion for Rehearing to specifically raise the Ninth Circuit decision in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1516 (1998), which was decided September 22, 1997 and was binding federal precedent in Chinle, Arizona. The New Mexico Supreme Court ultimately denied the motion.

After the denial of the motion for rehearing, Defendants filed a motion to the District Court challenging the subject matter jurisdiction of any New Mexico Court to take jurisdiction under the New Mexico Foreign Judgments Act, § 39-4A-3, N.M.S.A. 1978 (Cum.Supp. 1996) over the Navajo court judgment from Arizona following the definitive decision in *Wilson v. Marchington*. The New Mexico Foreign Judgments Act only allows judgments entitled to full faith and credit to be filed as foreign

judgments. *Wilson v. Marchington* held that Indian tribal court decisions are not subject to 28 U.S.C. § 1738 as separate territories and that therefore they are not entitled to full faith and credit. *Halwood* is directly contrary to the ruling in *Wilson v. Marchington*.

The trial court denied the Motion to Dismiss on November 20, 1997, sua sponte. Petitioners timely appealed. The New Mexico Court of Appeals issued its ruling that its subject matter jurisdiction was law of the case from the first ruling. The New Mexico Supreme Court denied the petition for certiorari on August 24, 1998.

In August, it came to the attention of counsel that New Mexico agencies have entered into special agreements with the Navajo Nation on a government to government basis which define state/tribal jurisdiction. *See* § 32A-1-8E, N.M.S.A. 1978 (Repl. 1996). Each court level in New Mexico was considered a separate agency for funding purposes until March of this year. The agreements between the courts which heard this case and Navajo Nation have been requested but not disclosed. App. 45.

REASONS FOR GRANTING THE PETITION

The New Mexico courts are claiming the power to grant direct full faith and credit to any tribal court judgment from any state in the union. In this predetermined process, punitive damages are unchallengeable seperately because they are deemed civil in nature. The opinion destroys the doctrine of comity and its discussion of the fairness of the forum. The opinion also destroys the meaning of full faith and credit as defined by the United

States Constitution by directly interfering with the jurisdiction of other states. This power to set national policy without any discussion of federalism or territorial jurisdiction is assumed by the New Mexico Court of Appeals. Even when confronted with the Ninth Circuit decision of *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1516 (1998) which certainly applies to Chinle, Arizona, the Court of Appeals claimed law of the case to avoid having to reconcile its claim that 28 U.S.C. § 1738 makes an Indian reservation a "territory" under the meaning of that statute. *Halwood* citing *Jim* at 79. *Halwood* needs to be overruled in its entirety and the interpretation of 28 U.S.C. § 1738 decided by this Court.

I. THE NAVAJO NATION COURT DOES NOT HAVE JURISDICTION TO AWARD PUNITIVE DAMAGES AGAINST A NON-INDIAN.

Petitioners have contested the jurisdiction of the Navajo Court to assess punitive damages against them from the beginning of this case. The New Mexico Court of Appeals has ruled that these punitive damages are civil in nature. To contest the punitive damages as civil rather than penal requires an argument defining the civil authority of the Navajo Nation courts over nonmembers.

The United States Supreme Court has made it clear that "absent authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997); accord *Louis v. United States*, 967 F. Supp. 456, 459 (D.N.M. 1997). *Strate* both reaffirms

and explains the Court's ruling in *Montana v. United States*, 450 U.S. 544, 565 (1981). In *Montana*, the Supreme Court held that the "exercise of jurisdiction beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegations." *Id.* at 564. Because of a tribe's internal relations extend only to the activities of the tribe and its members, "the inherent sovereign powers of an Indian tribe do not extend to nonmembers of the tribe." *Id.* at 565 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring) (Indian tribes have lost any "right of governing every person within their limits except themselves.")); *see also South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' "); L. Scott Gold, *The Consent Paradigm: Tribal Sovereignty at the Millenium*, 96 Colum.L.Rev. 809, 875 (1996) ("After *Montana*, tribes had sovereign powers only over consenting members unless greater powers were conferred by Congress.")

Under *Strate* and *Montana*, the Navajo Tribe lacks any basis for asserting subject matter jurisdiction over Petitioners Cowboy Auto Sales, Inc. and Bruce Williams pursuant to 7 N.T.C. § 607. The Navajo Tribe cannot point to any "existing law" that would permit it to bring these claims against nonmembers.

Nor is there any language in any treaty or act of Congress that could reasonably be construed to confer subject matter jurisdiction of this action upon the Tribal Court. The Navajo Treaty of 1868 confers no authority over nonmembers.

The Navajo Court also lacks jurisdiction over this action because the Navajo never ratified the proposed Navajo Constitution under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. The Indian Reorganization Act (IRA) is the main delegation of congressional legislative authority to the Indian tribes. Since the Navajo never ratified the IRA constitution, they have no delegated authority to pass tribal ordinances which apply to non-Indians. The Tribe may not enforce against non-Indians any provisions of tribal customary law, common law, or any other law which has not been delegated by Congress to apply to non-Indians. There is no inherent tribal sovereignty which regulates the conduct of non-Indians. All of the laws and ordinances of the Navajo Nation are without any legislative delegation of Congress under the United States Constitution.

The Secretary of Interior cannot approve tribal ordinances to apply to non-Indians without meeting the terms of the delegation conferred by Congress. There is no special delegation of legislative authority from Congress to the Navajo Nation or to the Secretary of Interior on behalf of the Navajo Nation. Approval of tribal ordinances by the Bureau of Indian Affairs Superintendent does not delegate any power over nonmembers. Until the Navajo Nation accepts the delegation of legislative authority in conformity with the Indian Reorganization Act, adopts a Navajo Constitution, reissues its tribal ordinances under its congressionally delegated authority, and has the ordinances approved by the Secretary of Interior, it has no jurisdiction over nonmembers. The original Complaint filed by the Halwoods in the Chinle District Court of the Navajo Nation wholly fails to cite any tribal

ordinance that governs the conduct of Bruce Williams or Cowboy Auto Sales, Inc. There simply is no tribal law that can be enforced against these defendants.

Even if jurisdiction were not barred on the above separate grounds, tribal court jurisdiction over nonmembers is presumed *not* to exist. The *Montana* Court recognized only two limited exceptions to this general rule:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-566; *accord Yellowstone County v. Pease*, 96 F.3d 1169, 1173-74 (9th Cir. 1996). *Montana*'s general rule and its exceptions apply equally to tribal legislative and adjudicatory power. *Strate*, 117 S.Ct. at 1409; *Pease*, 96 F.3d at 1175. The conduct alleged by the Halwoods in the Complaint does not meet either of these narrow exceptions. Accordingly, dismissal is required as a matter of law under *Montana* and its progeny.

The first *Montana* exception contemplates that a nonmember defendant brought into tribal court will have a consensual relationship with the plaintiffs based on "commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565; *see also Strate*, 117 S.Ct. at 1415; *Pease*, 96 F.3d at 1174. The term "consensual"

contemplates mutual consent, requiring knowledge by both parties that the relationship has been voluntarily entered. Petitioners do not dispute that the contract to sell the car was a consensual relationship with the Halwoods. However, this dispute did not arise until the Halwoods breached the contract by not making the payments for the car. The car was repossessed from the reservation because there no longer was a consensual relationship by contract between the parties. It is uncontested that the Halwoods failed to make the payments.

Montana's consensual relationship exception does not grant jurisdiction to a tribal court unless there is a *direct* connection between the harm alleged and the consensual relationship. *Strate*, 117 S.Ct. at 1415 (holding that tribal court had no jurisdiction over a tort suit against non-Indians arising out of an auto accident occurring within an Indian Reservation, even though the defendant vehicle owner was engaged in subcontract work for the tribe); *Crow Tribal Housing Authority v. Little Horn State Bank*, 13 Indian L.Rep. 6029, 6030 (Crow Tr.Ct. 1986) (holding that Crow Tribal Court had no jurisdiction over dispute arising out of nonresident non-Indian bank's refusal to honor a letter of credit that had been issued as bond for a tribal construction contract; the issuance of the letter of credit had to be considered separately from the underlying construction contract and therefore did not meet the "consensual relationship" test of *Montana*).

Similarly, the Navajo tribal ordinance 7 N.T.C. § 607 requires consent of the owners or a Navajo court order to repossess a vehicle from the reservation. The harm as stated by the Navajo court was the ignoring of this ordinance to "validly" repossess the car. This ignoring of the

Navajo ordinance for repossessing cars for non-payment is also the basis of the punitive damages. 7 N.T.C. § 609. The tribe lost any jurisdiction to enforce its ordinances against the non-Indian lienholder when the Halwoods breached the contract ending the consensual relationship of the contract. The claimed harm occured after the consensual relationship ended.

Thus, the action must be dismissed as a matter of law. Even if the allegations of the Respondents are assumed to be true, those allegations fail to establish a consensual relationship of the type required by *Strate*.

The second *Montana* exception permits tribal court jurisdiction over a non-Indian only if the alleged on-reservation conduct of the defendant "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (emphasis added). This exception is extremely narrow and applied only where the exercise of tribal court jurisdiction is essential to protect tribal self-government. *Strate*, 117 S.Ct. at 1416 (holding that *Montana*'s second exception applied only when tribal authority is necessary to preserve "the right of reservation Indians to make their own laws and be ruled by them"). Where, as here, the alleged harm is derivative of harm to individual tribal residents, the effect on the Navajo Nation is, by definition, indirect, and the second exception is not met.

Because the only alleged direct injury is to individual tribal citizens, the Navajo court order does not meet the second exception's requirement that the direct effect be to the Navajo Nation *as a whole*. As the Court in *Strate*

explained, the distinction between injury to tribal members and injury to the tribe must be maintained in order to ensure the viability of the second exception:

> Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule.

Id. at 1415; *see also Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) ("the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*"); *Pease*, 96 F.3d at 1174 (affirming district court's conclusion that although "state taxes affect the individual Pease, the taxes do not imperil the political integrity, economic security, or the health and welfare of the Crow Tribe"); *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1023 (8th Cir. 1997) (citing *South Dakota v. Bourland*, 39 F.3d 868, 870 (8th Cir. 1994) (no direct threat to overall welfare of the tribe even where the alleged actions of non-Indians "undeniably are vexatious to the individual Indians affected," as where nonmembers may have harassed cattle on tribal lands, let down fences and reduced the number of deer available to tribal members); *Red Fox v. Hettich*, 494 N.W.2d 638, 647 (S.D. 1993) ("[T]he second test under Montana is concerned with the effect upon *the tribe*, not on the individual tribal member . . . While it may be argued that the tribe may be 'indirectly' affected by [defendant's] conduct, only by stretching the test set forth in *Montana* to extremes can it be said that [the defendant's] conduct 'directly' affected

the tribe.") Thus, the uniform body of federal law following *Strate* demonstrates that the allegations of the Navajo Complaint fail as a matter of law to satisfy the second *Montana* exception's requirement of a direct threat to the political integrity of the Tribe.

The Halwoods allege criminal violations by Bruce Williams and Cowboy Auto Sales, Inc. The Halwoods claim the repossession of the car was a violation of 7 N.T.C. § 607. The Navajo tribal court lacks subject matter jurisdiction over these claims as a matter of federal law.

The United States Supreme Court has clearly held that Indian tribes' limited status divests tribes of inherent power to criminally prosecute non-Indians. *Oliphant*, 435 U.S. at 208. "By submitting to the overriding sovereignty of the United States, Indian tribes necessarily give up their power to try non-Indian citizens of the United States. . . . " *Id.* at 210. Subsequent courts have applied *Oliphant* to proscribe jurisdiction over punishments that are quasi-criminal in nature. *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 360 (D.N.M. 1981) (holding that *Oliphant* dicates that a tribe cannot assess civil penalties against non-Indians without explicit congressional authorization). Congress has not authorized the Navajo Tribe to impose on non-Indians the penalties sought here. Accordingly, under *Oliphant*, the Complaint must be dismissed.

In sum, this Court lacks subject matter jurisdiction over this case because: (1) no federal statute authorizes such jurisdiction, and the applicable treaty suggests that such powers are reserved to the United States; (2) there are no tribal ordinances applicable to this case; (3) neither of *Montana*'s narrow exceptions is met here; (4) *Oliphant*

precludes jurisdiction over the Complaint which alleges criminal offense. Any one of these reasons alone would require dismissal.

As general principle, a court may exercise personal jurisdiction over nonresidents only in accordance with the constitutional principles of due process announced by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *Accord Hinshaw v. Mahler*, 42 F.3d 1178, 1181 (9th Cir. 1994) (applying *International Shoe* analysis to tribal court's exercise of personal jurisdiction); *In re Defender*, 435 N.W. 2d 717, 720 and n.2 (S.D. 1989) (due process standards articulated in *International Shoe* apply to tribal courts as well as to state and federal courts). These constitutional principles require that a defendent have sufficient minimum contacts with the forum to ensure that compelling it to defend a lawsuit in the forum "does not offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. This court has recognized that the *International Shoe* analysis is applicable in actions brought in this Court. *See Little Horn State Bank*, 13 Indian L.Rep. at 6029.

Due process standards are more rigorous when applied to tribal courts. "[M]ore in the way of 'minimum contacts is required for a tribal court to exercise long-arm jurisdiction over a nonmember' than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state." *Red Fox v. Hettich*, 494 N.W. 2d 638, 645 (S.D. 1993). For example, in *Little Horn State Bank*, the court held that it lacked personal jurisdiction over a non-Indian bank that had dishonored a letter of credit given as bond on a tribal construction contract. The bank was not a party to the construction contract

with the tribal agency, and the bank's only activity on the Reservation consisted of delivery of the letter of credit. The Court held that this delivery was "an incidental contact with the Reservation and does not meet the minimum contact requirements needed to establish personal jurisdiction in the tribal court." *Little Horn State Bank,* 13 Indian L.Rep. at 6029.

The Tribe bears the burden of establishing that the Court has personal jurisdiction over defendants. *Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances,* 723 F.2d 357, 362 (3d Cir. 1983). The Tribe cannot meet this burden. None of the defendants has the required minimum contacts with the Navajo Indian Reservation to justify personal jurisdiction. *See Little Horn State Bank,* 13 Indian L.Rep. at 6029.

In sum, the Navajo court does not have sufficient minimum contacts with the Reservation to justify hauling them into tribal court. The Complaint must be dismissed for lack of personal jurisdiction.

The Court of Appeals of the State of New Mexico did not make any assessment as discussed above because they did not ever examine the case from the viewpoint of the Petitioners rights to due process or a fair forum. This analysis only takes place when a foreign judgment is enforceable as a matter of comity. The New Mexico Court of Appeals not only declares that the Navajo Nation in Arizona is a "territory" under 28 U.S.C. § 1738, it declares that the court judgments of that territory are due full faith and credit.

II. THE COURT OF APPEALS OF THE STATE OF NEW MEXICO DOES NOT HAVE THE AUTHORITY TO DECLARE THE NAVAJO RESERVATION IN ARIZONA A TERRITORY.

As argued in *Halwood*, the answer to this question of whether 28 U.S.C. § 1738 *entitles* Indian reservations to be treated as "territories" is not for a state court to decide. This is inherently a federal question for the federal courts to decide. Tribal governments are under the exclusive jurisdiction of the national government. the tribal lands are under the exclusive jurisdiction of Congress. The Indian people are wards of the national government. The fact is that Congress could have included Indian reservations specifically in the statute and did not. Also, Indian tribes are not states, territories or possessions. They are domestic dependent nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

In *Cherokee Nation*, this Court held that the Cherokee Nation was not a "foreign state" within the meaning of Article III of the Constitution and therefore, had the right to maintain their action in this Court. *Id.* at 16. The unique land status of the Indian reservations has never substantially changed. The right of occupancy on federal land has never changed. The right of the Indian tribes to self-governance over their own members is not challenged by this petition. All of the definitions of tribal sovereignty flow from this venerable characterization of Indian land status. However, the New Mexico courts have asserted that the Navajo Nation is a "territory." As a territory of the United States, Congress would have total legislative authority not subject to Art. III judicial review because this property was not under the Constitution at

its origin and therefore the authority to govern it does not arise under the Constitution. *Scott v. Sandford,* 60 U.S. 393, 436 (1857). People in the territories are not part of the "sovereign people" as defined by the *Scott* Court and therefore are not entitled to the rights and protections of citizens. The *Scott* Court ended Art. III judicial review applying in the acquired territories. In addition, the territories would be subject to taxation and would require adherence to all Constitutional provisions as determined by Congress. In short, such a classification is against the concept of inherent tribal sovereignty as described by Chief Justice Marshall in his famous trilogy of cases.

Jim v. CIT Financial Services expressly attempted to extend 28 U.S.C. § 1738 to Indian reservations within the territorial boundaries of New Mexico when it was originally adopted. The New Mexico Supreme Court in *Chischilly v. General Motors Acceptance Corporation,* 96 N.M. 113, 628 P.2d 683 (1981), reinterpreted the Navajo land status within New Mexico to overcome *Jim's* application. In New Mexico, the Navajo Nation is not a "territory" due full faith and credit. The New Mexico Court of Appeals in this case makes the Navajo reservation in Arizona a "territory" under 28 U.S.C. § 1738. There is no limit to this asserted power if it is allowed by this Court to continue. The New Mexico courts are presenting the same type of extra-territorial authority as tried last year to prevent extradition of a Native American Ohio prisoner released on a writ of habeas corpus. *New Mexico ex rel. Manuel Ortiz v. Timothy Reed,* 118 S.Ct. 1860 (1998).

If the Navajo reservation in Arizona is not a territory then this tribal court decision from Arizona is not entitled to full faith and credit under the New Mexico Foreign

Judgments Act § 39-4A-3, N.M.S.A. 1978 (Cum.Supp. 1996) to allow the New Mexico courts to take subject matter jurisdiction. The Ninth Circuit decision of *Wilson v. Marchington* directly interpreting 28 U.S.C. § 1738 should have ended the subject matter jurisdiction of New Mexico over this tribal judgment from Arizona. Both judgments interpret tribal court civil jurisdiction and punitive damages jurisdiction over nonmembers. The New Mexico Court of Appeals specifically ruled in *Halwood*.

> If the Navajo Tribal Court has subject matter jurisdiction here, our precedents require granting full faith and credit to its judgment awarding punitive damages. In *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 363, 533 P.2d 751, 752 (1975), the New Mexico Supreme Court held that "the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the Courts of New Mexico because the Navajo Nation is a 'territory' within the meaning of that statute."

App. 13.

Wilson v. Marchington asserts a basic principle "No legal judgment has any effect, of its own beyond the limits of the sovereignty from which its authority is derived." *Id.* at 807. It then concludes "In absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on the principles of comity." Comity is interpreted per *Hilton v. Guyot*, 159 U.S. 113 (1895) and the Restatement (Third) of Foreign Relations Law of the United States (1986). Extensive requirements to ensure personal and subject matter jurisdiction over a

defendant and protections on the fairness of the forum are imposed. *Wilson v. Marchington* at 809-811. As specifically held in *Wilson v. Marchington,* tribal court judgments are not entitled by federal law 28 U.S.C. § 1738 to full faith and credit. *Id.* at 809. The New Mexico Court of Appeals flippantly explains *Wilson v. Marchington* as allowing full faith and credit or comity to justify their extension of jurisdiction into Arizona. App. 3.

III. THE COURTS OF NEW MEXICO DO NOT HAVE THE AUTHORITY TO SET NATIONAL POLICY.

The New Mexico courts are placing their own legal precedents and state constitution provisions above the rulings of the Courts of the United States interpreting the United States Constitution. App. 13; *New Mexico ex rel. Manuel Ortiz v. Timothy Reed,* 118 S.Ct. 1860 (1998). Using a common law Indian trust analysis, the New Mexico courts are asserting sovereign authority in the state of Arizona. New Mexico does not possess sovereign authority in Arizona or in any other state. The Halwoods as Navajo Indians residing in Arizona are not citizens of New Mexico. New Mexico owes no sovereign duty to the Halwoods or to the Navajo Nation. This is a classic federal diversity situation. The New Mexico courts are reclassifying the sovereignties of the national government, states and Indian tribes.

Not since the end of slavery has a state court attempted to set national policy. The New Mexico Court of Appeals is repeating history for the Navajo Indians. The only difference in that New Mexico is asserting the mirror image of the *Scott v. Sandford,* 60 U.S. 393 (1857)

dilemma. In *Scott,* the courts were asked to include a minority into the whole of the sovereign people. The New Mexico Court of Appeals is asserting that the rights of a select minority are superior to the rights of the majority. In reality it is playing to a gap in judicial review leftover when the United States Supreme Court actually decided the *Scott* question by imposing its own political agenda. *Scott* gave slave owners special rights. *Halwood* gives Navajo Indians special rights. That political agenda broke the link between the legislative and territorial jurisdiction of the constitution to allow the people to be separated into classes by the courts and congress with different classes assigned different rights to process. The *Scott* Court actually removed the "territories" from Art. III jurisdiction and judicial review.

The Wisconsin Supreme Court reinterpreted a federal decision against the enforcement of the fugitive slave law after the *Scott* decision. The case was *Ableman v. Booth,* 62 U.S. (21 How.) 506 (1859). The interpretation of the United States Supreme Court of the constitutional clauses was correct and directly on point for this case. *Ableman* defines the jurisdiction of the state courts within the federal system and prevents state courts with interfering with the interpretation or enforcement of federal laws. The New Mexico opinion of *Halwood* is in opposition to the decision in *Wilson v. Marchington* and the Marshall trilogy. The decisions purport to apply to the same physical area in Arizona on the Navajo reservation. New Mexico is not only effecting the jurisdiction of Arizona courts but of the Ninth Circuit Court of Appeals and the United States Supreme Court. *Wilson v. Marchington* declines to apply 28 U.S.C. § 1738 to Indian reservations. It clearly

selects the doctrine of comity over full faith and credit. Both decisions cannot remain in force according to *Ableman v. Booth.* If federal law was consistent, a simple citation to this case would be enough to dispose of this Petition by memorandum decision.

The fact is that the law regarding Indians is not consistent. There are currently two separate lines of case law. The New Mexico Courts in *Halwood* have followed the line primarily represented by *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985) and *Iowa Mutual v. LaPlante,* 480 U.S. 9 (1987). *Wilson v. Marchington* follows *Strate v. A-1 Contractors* and *Montana v. United States.* As Senior Judge William Canby explains present civil jurisdiction of the Indian tribes:

> "Much recent litigation has been concerned with the power of tribal courts to entertain claims against non-Indian (or nonmember) defendants that arise in Indian Country. For years the tribes made no attempt to exercise that power by compulsion. . . . Recently, some tribes have revised their codes to permit their tribal courts generally to exercise jurisdiction over non-Indians for reservation-based claims. A non-Indian contested such jurisdiction in *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985). The Supreme Court did not resolve the question, but deferred to the tribal court so that it could determine its own jurisdiction in the first instance. The Court made it clear that *Oliphant v. Susquamish Indian Tribe,* 435 U.S 191 (1978), which held that the tribes had no criminal jurisdiction over non-Indians, did not control the question of the tribes' civil jurisdiction.

In *Iowa Mutual Ins. Cos. v. La Plante*, 480 U.S. 9 (1987), the Supreme Court similarly stayed its diversity jurisdiction to permit a tribal court to determine its own jurisdiction over parallel litigation. Here again, the Supreme Court did not actually decide whether the tribal court had power to entertain a case against a non-Indian defendant, but its language was very affirmative:

> 'Tribal authority over the activities of non-Indians is an important part of tribal sovereignty. * * * Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'

Id. at 18.

This passage encouraged many tribes, and numbers of lower courts, to assume that tribal courts could exercise general civil jurisdiction over all reservation-based litigation, particularly if one of the parties was a tribe or a tribal member. The seeds of a narrower view had already been planted in *Montana v. United States*, 450 U.S. 544 (1981)."

American Indian Law, 3rd edition, pps. 189-190.

Judge Canby after laying out the *Montana* analysis continues:

"The Supreme Court carried *Montana* a step farther in 1997, when it held that a tribal court had no jurisdiction over litigation between non-members arising out of a vehicle accident on a state highway within a reservation. *Strate v. A-1*

Contractors, 117 S.Ct. 1404 (1997). The Court narrowed the statement in *LaPlante* that civil jurisdiction 'presumptively lies in the tribal courts'; that statement, according to *Strate*, meant nothing more than that the tribal court presumptively had jurisdiction over those non-Indian activities that the tribe could regulate under *Montana*."

"The degree to which *Strate* presages further restrictions on tribal jurisdiction over nonmembers is uncertain. *Strate* stated that it was expressing no view on the governing law or proper forum when such an accident occurs on a tribal road. The major conceptual issue to be resolved is whether *Montana* should be treated as an exception, confined to non-Indian fee lands, to the general sovereignty that a tribe may exercise over its reservation, or whether *Montana* now provides the all-encompassing formula for trial jurisdiction over nonmembers. Some state courts have already adopted the latter, expansive view of *Montana State v. Zaman*, 190 Ariz. 208, 946 P.2d 459, 463 (Ariz. 1997), *cert. denied*, 118 S.Ct. 1167 (1998)."

American Indian Law, 3rd edition, pps. 191-192.

This Court can correct the inconsistency of the above cases by revesting legislative jurisdiction of the Congress over all the territories. Legislative jurisdiction was defined by the structure of the Constitution. Power over individuals was either specifically enumerated to the Congress or expressly prohibited to the State Legislatures by the structure. Territories were governed exclusively by Congress exercising both state and federal powers until

statehood. *American and Ocean Insurance Companies v. Canter*, 26 U.S. (1 Pet.) 511 (1828). The United States Supreme Court using general principles of common law and the Amendments is the only government entity that can actually enforce individual rights against all the other governmental entities to protect the constitutional processes which check and balance the structure. And, it is crucial that all individuals within the territorial jurisdiction of the United States receive the protection of this separation of legislative jurisdiction. Federalist Paper No. 23.

Of course, *Scott v. Sandford* deliberately broke the structure by preventing the exercise of legislative jurisdiction by Congress to naturalize former slaves after 1808 as expressly enumerated in Art. I, Sec. 9, Cl. 1; by constitutional amendment in Art. V; and in the territories under the Northwest Ordinance and Missouri Compromise pursuant to Art. IV, Sec. 3, Cl. 2. All three had to be done at the same time in order for the Court to assume the sovereign trust power against Congress. The territorial power then was placed beyond judicial review. This rationale became the basis for *permanently* upholding the fugitive slave act and the special rights of slave owners against all others. The Civil War Amendments did not correct the legislative jurisdiction problem created by this Court. *See generally, The Civil Rights Cases*, 106 U.S. 3 (1883).

The political accountability federalism analysis proposes a simple solution – reset the links of legislative jurisdiction as enumerated and prohibited in the Constitution. Make congressional legislative jurisdiction once again equal to its territorial jurisdiction by reinterpreting Art. III to protect all individuals within the territorial

limits of the Constitution as the sovereign people. Say it was a political decision not within the judicial review authority of the Court to determine which individuals could be naturalized. Rule that only Congress can decide naturalization and balance the interests of tribal governments to the individual rights of Native Americans. Then apply *Ableman* and its progeny to prohibit the New Mexico courts from asserting jurisdiction in the State of Arizona through its foreign judgments act or under any other authority. Enumerate that only Congress has the authority to determine Indian Commerce and set Indian policy for the Indian Tribes because the reservations are composed of federal land held under the legislative authority of Congress. This prevents any claim of extra-constitutional power by the states and national government.

The ending of this federal common law judicial activism on behalf of specific ethnic groups will impact the Indian tribes more than any other group because of the dual case line. This power to define sovereign people directly survived the Fourteenth Amendment's attempt to include individual Indians not taxed, no longer living under tribal law, as citizens. *Elk v. Wilkins,* 112 U.S. 94 (1884). The Courts have used their own assumption of the "trust responsibility" to prevent the application of federal laws as passed by Congress. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) (discussing the application of the Indian Civil Rights Act). Congress will finally have plenary power over the Indian tribes. *United States v. Kagama,* 118 U.S. 375 (1886). Under this analysis it will actually be possible to enforce distinctions between tribal interests and individual member interests by holding

Congress accountable for federal Indian policy. The jurisdictional and separation of powers problems arise when individual interests of tribal members are used to advance tribal interests over nonmembers. *Strate*'s interpretation of *Montana* separates tribal member's interests from tribal interests. See American Indian Law pps. 193-194 describing *Yellowstone County v. Pease,* 96 F.3d 1169 (9th Cir. 1996) and *Wilson v. Marchington,* 127 F.3d 805 (9th Cir. 1997), *cert. denied,* 118 S.Ct. 1516 (1998).

This is just the next step in defining federalism and strengthens the decisions already issued by this Court. The solution is proposed as part of this Petition because of this Court's reluctance to confront the territorial issue in *Kiowa Tribe v. Manufacturing Technologies, Inc.,* 118 S.Ct. 1700 (1998) and for its denial of the Petition for Certiorari in *Wilson v. Marchington.* This Court has already stated that land status is determinitive of whether land is "Indian country" in Indian cases. *Alaska v. Native Village of Venetie,* 118 S.Ct. 948 (1998). This Court rejected an attempt to expand the Indian trust against the express statute of Congress in *Cass County v. Leech Lake Band of Chippewa Indians,* 118 S.Ct. 1904 (1998). This case can link these decisions to the other major opinions by dealing with the "entitlement" New Mexico sees to interpret 28 U.S.C. § 1738 to apply to Indian reservations. Federal entitlements as mandated are the basic subject of the main decisions on this new federalism test. The Congress does not have the authority to order a state to enforce a federal program by compelling the State Executive. *Printz v. United States,* 117 S.Ct. 2365 (1997). Nor can Congress compel or coerce a state legislature to regulate according to a federal program. *New York v. United States,* 505 U.S.

144 (1992). Most importantly, by reconfining the legislative jurisdiction to equal territorial jurisdiction the constitutional processes as written by the Framers are protected. *Clinton v. City of New York,* 118 S.Ct. 2091 (1998).

Now, in *Halwood* the State of New Mexico has assumed implied federal power to change the rights of individuals to legal process by interpreting the rights of the Halwoods to be superior to the rights of Bruce Williams, a non-Indian. The Navajo Nation has no interest in this case, only the Halwoods have an interest according to the New Mexico Court of Appeals. App. 14 (Punitive damages are not penal in this case because they serve a civil end to an individual . . .). New Mexico has accomplished this by granting full faith and credit to the "laws of the Navajo Nation." App. 13, quoting *Jim v. CIT Financial Services.*

IV. THE FULL FAITH AND CREDIT CLAUSE IS ENFORCED BY GENERAL LAWS PASSED BY CONGRESS AND CONGRESS HAS NOT PASSED ANY LAWS EXTENDING FULL FAITH AND CREDIT TO ANY GENERAL TRIBAL COURT DECISIONS.

The jurisdictional statute relied upon by New Mexico to "entitle" the Navajo reservation to be deemed a "territory" is 28 U.S.C. § 1738. This federal court jurisdictional provision applies the Full Faith and Credit Clause, Art. IV, Sec. 1. Indian tribal governments are not states, territories or possessions, they are domestic dependent nations with inherent tribal sovereignty to protect tribal interests. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).

The New Mexico courts have merged the constitutional process rights of non-Indians with the congressional enactments to protect Indian tribal interests. The Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., does grant full faith and credit to specific types of tribal court judgments. The agreements entered into by New Mexico courts are based upon the Indian Child Welfare Act. The New Mexico Court of Appeals has made the Indian Child Welfare Act the general law of New Mexico for family court processes. See *New Mexico ex rel. Human Services Dep't v. Barela,* 117 N.M. 526, 873 P.2d 272 (Ct.App. 1994).

According to *Jim v. CIT Financial Services,* as quoted in *Halwood,* New Mexico is granting full faith and credit to the "laws of the Navajo Nation." The reasoning places the laws of the Navajo Nation at least at the same level as the "acts" of any state, territory or possession of the union. The New Mexico courts are not merely enforcing the Navajo tribal judgment against Mr. Williams, the New Mexico Court of Appeals is ceding Mr. Williams' right to contest the Navajo jurisdiction from Arizona which is the basis of the judgment. *Halwood* has already been applied against Mr. Williams to produce this result by denying him any right to introduce evidence in the New Mexico trial court to disprove Navajo tribal court jurisdiction. *Begay v. Cowboy Auto Sales and Bruce Williams,* Pet. for Writ of Prohibition, N.M. Sup. Ct. No. 25004 (March 24, 1998).

Congress certainly did not intend to deprive non-Indian citizens of their most basic due process rights when it passed 28 U.S.C. § 1738 in 1804. *Wilson v. Marchington* explains that if Congress had wanted to

extend full faith and credit to other tribal court proceedings, it could have done so. *Id.* at 809. Congress has not passed any general laws which extend full faith and credit to general tribal court judgments. Congress is the only branch of the federal government that can be held accountable for changes in the Indian policy.

This Court last term issued *Baker by Thomas v. General Motors Corp.*, 118 S.Ct. 657 (1998) a unanimous decision on the application of full faith and credit of a judgment issued in one state and its enforceability by another state. *Baker* applies the doctrine of full faith and credit to a case involving an injunctive order issued by a Michigan court to whether that order prevents a court of a different state from ordering testimony from the person bound by the injunctive order not to testify. In reaching the holding that the Michigan injunction does not bind the courts of Georgia or Missouri, the U.S. Supreme Court defines the territorial reach of state courts against one another under full faith and credit. The Michigan order could not interfere with the jurisdiction of the other state. *Id.* at 667.

New Mexico is interfering with the right of Arizona (and potentially every other state) to determine under its own jurisdiction recognition of tribal court judgments rendered in Arizona. Just like Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance, New Mexico has no authority to confer personal jurisdiction over Bruce Williams or Cowboy Auto Sales to a Navajo tribunal in Arizona.

CONCLUSION

The decisions of the New Mexico Court of Appeals should be reversed. This Court should grant the petition to address the important judicial review question presented by the New Mexico Court of Appeals attempting to set a national policy through state judicial review of enforcement of tribal court judgments against nonmembers.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

WILSON HALWOOD, JR., ET AL.,

Plaintiffs-Appellees,

vs. No. 19,008

COWBOY AUTO SALES, INC., ET AL.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT
OF McKINLEY COUNTY
JOSEPH L. RICH, District Judge

Richard N. Feferman
Susan Warren
Law Offices of Richard N. Feferman
Albuquerque, New Mexico for Appellees

Lana E. Marcussen
Albuquerque, New Mexico for Appellants

MEMORANDUM OPINION

(Filed Jul. 8, 1998)

FLORES, Judge.

Defendants appeal from the district court's Order (1) denying Defendants' motion to dismiss; and, (2) determining that the judgment of the Navajo Nation district court will be enforced in its entirety. The calendar notice proposed to affirm. Defendants filed a timely memorandum in opposition. We affirm.

Both of Defendants' issues address whether New Mexico district courts have subject matter jurisdiction to enforce the judgment entered by the Navajo district court. First, as set forth in the calendar notice, we hold

that review of Defendants' issues is precluded by the doctrine of "law of the case." *See Gerety v. Demers* (*Gerety II*), 92 N.M. 396, 404, 589 P.2d 180, 188 (1978) (recognizing that the doctrine of law of the case applies not only to questions specifically decided but also to those necessarily involved and to those questions which could have been so raised; doctrine of "law of the case" means that the law applied on the first appeal of the case is binding on the second appeal). We recognize that *Gerety II*, 92 N.M. at 406, 589 P.2d at 190, reverses *Demers v. Gerety* (*Gerety I*), 92 N.M. 749, 595 P.2d 387 (Ct. App. 1978), on the issue of jury instructions because the respondent did not take the necessary steps to establish as the law of the case a prior appellate decision that there was no consent or informed consent to surgery. *Gerety II* did not, however, reverse the basic principle of the law of the case.

Further, although we are not bound by law of the case when there has been subsequent authority from the United States Supreme Court, *see Jacobs v. Meister*, 108 N.M. 488, 494, 775 P.2d 254, 260 (Ct. App. 1989), Defendants have not referred this Court to any subsequent applicable United States Supreme Court authority. The holding in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), is not from a higher authority as contemplated in *Jacobs*.

Moreover, we also recognize that this Court is not obligated to apply the law of the case doctrine "where doing so might result in a manifestly unjust decision and where the essential facts have been altered by a substantial change in the evidence." *Moya v. Catholic Archdiocese of N.M.*, 107 N.M. 245, 248, 755 P.2d 583, 586 (1988). However, the circumstances contemplated by the *Moya*

holding do not exist in the present case – a decision from a 9th Circuit Court that is allegedly in support of Defendants' position does not constitute an alteration of the essential facts or result in a manifestly unjust decision in the present case. *Cf. id.*, 107 N.M. at 247-48, 755 P.2d at 585-86 (where the defendant successfully defrauded the appellate court by false testimony the appellate court exercised its inherent power to grant relief).

Apart from application of the law of the case doctrine, we note that the holding in *Halwood v. Cowboy Auto Sales, Inc.*, 1887-NMCA-098, 124 N.M. 77, 946 P.2d 1088, does not contravene the principle set forth in *Wilson*. This Court in *Halwood* held "that New Mexico courts should recognize such judgments from tribal courts under the doctrines of full faith and credit *or comity*." *Id.*, ¶ 3 (emphasis added). Thus, even if we agreed that it was improper for this Court in *Halwood* to refer to the full faith and credit clause, the tribal judgment may nonetheless be recognized properly, as directed in *Halwood*, by the doctrine of comity.

For the reasons set forth herein, we affirm.

IT IS SO ORDERED.

/s/ Benny E. Flores
BENNY E. FLORES, Judge

WE CONCUR:

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

WILSON HALWOOD, JR.
and LORENA HALWOOD,

Plaintiffs,

vs. No. CV-95-230-II

COWBOY AUTO SALES, INC. and
BRUCE WILLIAMS,

Defendants.

ORDER

(Filed Nov. 20, 1997)

This matter comes before the Court upon the Mandate to the District Court Clerk from the New Mexico Court of Appeals, following the entry of an opinion by that Court, the New Mexico Supreme Court's denial of defendants' Petition for Certiorari, Defendants' Motion to Continue Stay of Execution, and the Defendants' Motion to Dismiss.

IT IS HEREBY ORDERED:

1. The Defendants' Motion to Dismiss is denied, Sua Sponte.

2. The Judgment of the District Court of the Navajo Nation will be enforced in its entirety.

3. The Order Staying Execution entered January 26, 1996 is withdrawn.

4. The Motion to Continue Stay is denied.

5. The Plaintiff's are awarded costs for their appeal in the amount of $158.00.

Wherefore, LET EXECUTION ISSUE.

/s/ J. L. Rich
Joseph L. Rich
District Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Friday, October 10, 1997

NO. 24,623

WILSON HALWOOD, JR., and LORENA HALWOOD,

Plaintiffs-Respondents,

vs.

COWBOY AUTO SALES, INC., and BRUCE WILLIAMS,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court, upon motion of petitioner for reconsideration, and the Court having considered said motion, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion for reconsideration is **denied.**

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Chief Deputy

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, September 24, 1997

NO. 24,623

WILSON HALWOOD, JR., and LORENA HALWOOD,

Plaintiffs-Respondents,

vs.

COWBOY AUTO SALES, INC., and BRUCE WILLIAMS,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number 17566.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Chief Deputy

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WILSON HALWOOD, Jr., and LORENA HALWOOD,

Plaintiffs-Appellants,

No. 17,566
D.C. No. CV 95-230

vs.

COWBOY AUTO SALES, INC., and BRUCE WILLIAMS,

Defendants-Appellees.

LYNN PICKARD
Presiding Judge

RUDY S. APODACA
RICHARD C. BOSSON
Judges

_____/

(Filed Jul. 29, 1997)

In this cause, a motion for rehearing having been filed by Appellees, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing is DENIED.

/s/ Lynn Pickard
Presiding Judge

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

Opinion Number _____
Filing Date: _____
Docket No. 17,566
WILSON HALWOOD, JR. and LORENA HALWOOD,

Plaintiffs-Appellants,

vs.

COWBOY AUTO SALES, INC. and
BRUCE WILLIAMS,

Defendants-Appelleees.

APPEAL FROM THE DISTRICT COURT OF
MCKINLEY COUNTY
JOSEPH L. RICH, District Judge

RICHARD N. FEFERMAN
SUSAN WARREN
LAW OFFICES OF RICHARD N. FEFERMAN
Albuquerque, NM

for Appellants

LANA E. MARCUSSEN
Albuquerque, NM

for Appellees

OPINION

PICKARD, Judge.

1. On motion for rehearing, the opinion filed April 30, 1997, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied, and the motion to strike is denied.

2. A Navajo Tribal Court (tribal court) granted Indian Plaintiffs a default judgment of compensatory, statutory, and punitive damages for non-Indian Defendants' wrongful repossession of Plaintiffs' car from the reservation. Plaintiffs then sought to enforce the judgment in the McKinley County District Court (district court). That court enforced the judgment, except for the punitive damages. Determining that the punitive damages were penal in nature, the district court reasoned that the Navajo court was without jurisdiction to award them against non-Indians. The question before us is whether New Mexico courts should recognize punitive damages awarded against non-Indian defendants in a Navajo tribal court for conduct on the Navajo reservation. We conclude that the punitive damages awarded in this case are not penal in the criminal sense and thus fall within the Navajo tribal court's jurisdiction. We hold that New Mexico courts should recognize such judgments from tribal courts under the doctrines of full faith and credit or comity. Accordingly, we reverse.

BACKGROUND/PROCEDURAL HISTORY

3. The following facts are taken from the Findings of Fact and Conclusions of Law and Judgement entered by default by the District Court of the Navajo Nation, Chinle, Arizona, on January 27, 1992, No. CH-CV-71-91. Plaintiffs are enrolled members of the Navajo Tribe. They bought a used car from Defendant Cowboy Auto Sales on November 2, 1989. Defendant Bruce Williams personally sold the car to the Plaintiffs. On November 30, 1990, Defendants repossessed the car from Plaintiffs' residence on the Navajo reservation near Chinle, Arizona, when

Plaintiffs were not at home and removed it from Navajo territorial jurisdiction. Defendants repossessed the car without first receiving Plaintiffs' written consent or a valid Navajo tribal court order permitting the repossession. The Navajo Tribal Code allows repossession of Navajo Indians' personal property from tribal territory only if the buyer consents in writing or the creditor first obtains a valid tribal court order. Navajo Tribal Code tit. 7, § 607 (1977). Defendants entered Plaintiffs' realty without Plaintiffs' consent and against their will. Plaintiffs then requested the return of their vehicle, but Defendants refused, thereafter selling the vehicle and converting the proceeds.

4. Plaintiffs sued Defendants in the Chinle District Navajo Tribal Court, complaining of illegal repossession, trespass, and conversion. Plaintiffs claimed statutory damages for illegal repossession, compensatory damages for trespass to their realty and for conversion of their car, attorney fees, interest, and, most relevant to this appeal, punitive damages.

5. Each Defendant was properly served with the complaint and a summons to the tribal court. Defendants, however, failed to plead or answer Plaintiffs' complaint. Plaintiffs then moved for default judgment against Defendants and sent Defendants a notice of default. Defendants did not respond to this and later notices of default, and the tribal court eventually entered a default judgment against them in favor of Plaintiffs.

6. The tribal court judgment granted Plaintiffs approximately $5,000 in interest, costs, compensatory and statutory damages, and attorney fees. The tribal court

also granted Plaintiffs $25,000 in punitive damages, finding that Defendants willfully chose to disregard Navajo law when they repossessed Plaintiffs' car, in willful, wanton, and deliberate violation of Plaintiffs' rights. The tribal court based the decision to award punitive damages on the fact that Defendants had illegally repossessed cars from other Navajos in the same way and had even suffered judgments in those other cases that included punitive damages. Those judgments were entered prior to Defendants' actions in this case. The tribal court concluded that Defendants undoubtedly knew Navajo Nation laws regarding repossession because of their litigation experience, and therefore knew this repossession was illegal, but Defendant chose instead to disregard Navajo law and the rights of Plaintiffs, as well as the rights of the people of the Navajo Nation.

7. Plaintiffs filed an action in the McKinley County District Court to enforce their judgment under the New Mexico Foreign Judgments Act, NMSA 1978, Section 39-4A-3 (Cum.Supp.1996). Defendants made no effort to declare the entire judgment void for lack of tribal court jurisdiction; Defendants offered no evidence to contradict the jurisdictional findings in the tribal court judgment. The district court issued an order granting full faith and credit to the judgment, but vacating the punitive damages. In deciding to vacate the punitive damages, the district court relied on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), reasoning that due to the penal nature of punitive damages, the Navajo Nation lacked jurisdiction to impose punitive damages on nonmembers of the Navajo Tribe.

8. Plaintiffs appeal the order vacating the grant of punitive damages. Defendants did not cross-appeal from that part of the district court order enforcing the remainder of the tribal court judgment. We reverse.

DISCUSSION

Full Faith and Credit

9. Plaintiffs contend that the district court erred in holding that the Navajo Tribal Court lacked jurisdiction to impose punitive damages on a non-member who was otherwise subject to the Navajo court's jurisdiction. Defendants acknowledge that under present New Mexico case law, the power to award punitive damages may be within the Navajo Tribal Court's subject matter jurisdiction. If the Navajo Tribal Court has subject matter jurisdiction here, our precedents require granting full faith and credit to its judgment awarding punitive damages. In *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 363, 533 P.2d 751, 752 (1975), the New Mexico Supreme Court held that "the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the Courts of New Mexico because the Navajo Nation is a 'territory' within the meaning of that statute."

10. Defendants answer that New Mexico recognition of punitive damages as being within the jurisdiction of the Navajo tribe would violate Defendants' federal due process and equal protection rights under *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* addressed the question of whether an Indian tribe had criminal jurisdiction over a nonmember Indian. The Supreme Court answered this

question in the negative, holding that the dependent status of Indian tribes made their criminal prosecution of a non-member Indian inconsistent with the non-member's rights as a United States citizen. *Id.* at 697. Congress has subsequently superseded the holding in *Duro* and expanded the criminal authority of Indian tribes. *See State v. Pena*, 117 N.M. 528, 530, 873 P.2d 274, 276 (Ct.App.1994) (for a discussion of 25 U.S.C.A. § 1301(2)). That congressional action erodes Defendants' reliance on *Duro*.

11. Primarily however, Defendants' reliance on *Duro* is misplaced because *Duro* is a criminal case. This fact creates a large difference between the issues there and the issue present here, most notably the difference between imposing criminal penalties and imposing civil punitive damages. In *Chischilly v. General Motors Acceptance Corp.*, 96 N.M. 264, 269, 629 P.2d 340, 345 (Ct.App.1980), *rev'd on other grounds*, 96 N.M. 113, 628 P.2d 683 (1981) (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 198-99 (N.Y.1918)), we said:

> A statute penal . . . [within the rules of private international law] is one that awards a penalty to the state . . . or to a member of the public, suing in the interest of the whole community to redress a public wrong. [Cites omitted] The purpose must be, not reparation to one aggrieved, but vindication of the public justice. . . . [T]he statute is not penal in the international sense . . . [when] the purpose of the punishment is reparation to those aggrieved by his offense.

See also Svejcara v. Whitman, 82 N.M. 739, 741, 487 P.2d 167, 169 (Ct.App.1971) ("Punitive damage serves a civil end to an individual, while criminal sanctions serve a

criminal end to the public."). In *Chischilly*, this Court held that 7 N.T.C. § 609, which provided statutory damages for wrongful repossessions, was not penal, and therefore was entitled to full faith and credit under Jim. *Chischilly*, 96 N.M. at 268-69, 629 P.2d at 344-45.

12. The analysis in *Chischilly* applies here. Granting punitive damages to Plaintiffs was not an imposition of criminal penalties upon Defendants by the Navajo Tribal Court. The punitive damages were reparation to Plaintiffs aggrieved by Defendants' wrongful repossession. In no way did granting the punitive damages to Plaintiffs amount to awarding a penalty to the Navajo tribe.

13. The district court based its decision to vacate the punitive damages award on *Oliphant*, 435 U.S. 191, reasoning that the penal nature of punitive damages made the tribal court without jurisdiction to impose them on a non-member. In *Oliphant*, two non-Indian residents of the Suquamish Indian Tribe's Reservation in Port Madison, Washington, were arrested and charged with criminal offenses. *Id.* at 194. They applied for writs of habeas corpus in federal court, arguing that the Suquamish Indian Provisional Court did not have criminal jurisdiction over non-Indians. *Id.* The Supreme Court stated that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210.

14. *Oliphant*, then, announced limits on tribal power to try non-Indians in criminal proceedings. The basis for that limitation is found in the following language in *Duro*, 495 U.S. at 693: "Criminal trial and punishment is so

serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." But that sort of power is not at issue in this case. Punitive damages are a matter of civil law. *Cf. Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989) (punitive damages appropriate for tort of conversion). Civil jurisdiction over the activities of non-Indians on reservation lands, engaged in pursuant to consensual commercial or contractual arrangements, presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). In LaPlante, the Supreme Court denied a non-Indian defendant insurance company a declaration that it had no duty to defend a suit by Indian plaintiffs seeking compensatory and punitive damages in tribal court. *Id.* at 11. The Supreme Court explained that although criminal jurisdiction of tribal courts was subject to substantial federal limitation, their civil jurisdiction was not similarly restricted. *Id.* at 15. We are aware of no treaty or federal statute divesting tribal courts of the power to impose civil punitive damages upon non-Indian defendants whose conduct occurs on reservation lands, and Defendants point us to none.

15. Defendants do argue, however, that any reliance on *LaPlante* is seriously eroded by the United States Supreme Court's recent decision in *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997). We disagree for two reasons. First, the Court in *Strate* was careful to emphasize that the land on which the incident in that case arose was a state highway, and the Court expressed no opinion on

whether the same result would obtain if the incident arose on a tribal road within the reservation. *Id.* at 1408. Here, the repossession which underlay the tribal court judgment occurred at Plaintiffs' residence on the reservation.

16. Second, the Court in *Strate* reaffirmed the basic *LaPlante* proposition saying, "where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' " *Strate*, 117 S.Ct. at 1413 (quoting *LaPlante*, 480 U.S. at 18). Tribes possess such authority over the activities of nonmembers who enter consensual relationships with the tribes' members through commercial dealings and contracts. *Strate*, 117 S.Ct. at 1415; *see Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980). "[T]ribes retain considerable control over nonmember conduct on tribal land." *Strate*, 117 S.Ct. at 1413. It therefore follows that tribes possess adjudicative authority over the regulated on-reservation activities of nonmembers when those activities are purportedly justified by the contract, but are in fact contrary to the express provisions of the tribal code.

17. Defendants also argue that federal cases have held punitive damages against non-Indians to be outside the jurisdiction of tribal courts. The example they cite that comes closest to such a holding is *UNC Resources, Inc. v. Benally*, 514 F.Supp. 358 (D.N.M.1981). That case involved a spill of uranium tailings that allegedly injured the livestock of several Navajos and caused other harm. *Id.* at 360. The only areas affected, however, were off the reservation. *Id.* The court merely stated that the tribal

court's civil authority over non-Indians stopped at the reservation boundary. *Id.* at 362. Here, the tortious conduct occurred on the reservation, and *Benally* is therefore easily distinguished.

18. We believe that a more appropriate federal case is *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir.1983), *cert. denied*, 466 U.S. 926 (1984). There, the court said, "[t]ribal power includes 'a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.' " *Id.* at 601 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). *Babbitt Ford, Inc.* upheld the tribe's authority to impose a statutory measure of damages, above mere compensation, on a car dealer that wrongfully repossessed a vehicle. *Id.* The lower court held that the measure, not being compensatory, was penal and therefore within the prohibition on tribal court jurisdiction. *Id.* at 600. The Ninth Circuit disagreed and held that the statutory damage award, being similar to statutes in both Arizona and New Mexico, as well as other consumer legislation, was within the jurisdiction of the tribal courts. *Id.* at 601. The same may be said with regard to the punitive damage award here.

19. Defendants also allege in their brief, for the first time in almost six years of litigation, that Defendants repossessed the car in Gallup, New Mexico, while Plaintiffs were shopping, and then drove Plaintiffs to their home on the reservation as a matter of courtesy. Defendants allege these facts to the wrong court. Matters not of record are not reviewable for the first time on appeal. *See Morningstar Water Users Ass'n, Inc. v. Farmington Mun.*

Sch. Dist. No. 5, 120 N.M. 307, 320, 901 P.2d 725, 738 (1995). Defendants made no effort to elicit this factual predicate either before the tribal court or before the district court by way of a jurisdictional challenge to enforcement of the judgment. *See generally Thoma v. Thoma*, 1996 WL 796870 (N.M. Ct. App. Dec. 24, 1996), *cert. denied*, ___ N.M. ___, 932 P.2d 498 (1997). Although we may consider challenges to subject matter jurisdiction for the first time on appeal, we must do so on the basis of the record previously developed. *See State v. Thomas*, 113 N.M. 298, 300, 825 P.2d 231, 233 (Ct.App.1991). As such, we decline to address any importance these allegations may have to this case.

20. The Navajo Tribal Court's decision to grant punitive damages in this case is not at odds with New Mexico law on the subject. Punitive damages may be awarded where the wrongdoer's conduct is " 'maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiffs' rights.' " *Green Tree Acceptance, Inc.*, 108 N.M. at 174, 769 P.2d at 87 (action for conversion will sustain award of punitive damages) (quoting *Loucks v. Albuquerque*, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966)). The Navajo Tribal Court granted Plaintiffs punitive damages because Defendants intentionally repossessed the car in blatant disregard of Plaintiffs' rights. An award of punitive damages is entitled to full faith and credit where the law of the jurisdiction awarding the punitive damages does not conflict with the law of the jurisdiction enforcing the judgment. *Cf. Ault v. Bradley*, 564 So.2d 374, 379 (La.Ct.App.) (absent showing law of jurisdiction rendering judgment of punitive damages differs from law of jurisdiction

enforcing them, forum presumes law to be the same and grants full faith and credit), *cert. denied*, 569 So.2d 967 (La.1990). Here, since the Navajo Tribal Court awarded punitive damages for conduct for which New Mexico would grant them, there are no differing laws on the subject to bar granting full faith and credit.

21. Based on the foregoing analysis, the judgment for punitive damages Plaintiffs sought to enforce in district court was not penal in nature in the sense of imposing criminal penalties. It follows that under the Supreme Court's pronouncement in *LaPlante* of presumptive civil jurisdiction in tribal courts over non-Indians on reservation lands, the Navajo Tribal Court had jurisdiction to impose punitive damages on Defendants. We therefore hold that an award of punitive damages against a non-Indian for conduct occurring on a Navajo reservation is entitled to full faith and credit in New Mexico courts.

22. Defendants go to great lengths in arguing that *Jim* wrongly decided that the Navajo Nation was a "territory" within the meaning of 28 U.S.C. § 1738, and that New Mexico was thus required to give Navajo law full faith and credit. Defendants suggest that we should reconsider *Jim*, reverse it, and adopt a rule of comity for enforcing tribal court judgments. Once again, Defendants address their argument to the wrong court. This Court is bound by precedents of the New Mexico Supreme Court. *State v. Wilson*, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994). But even if we did adopt a rule of comity, the result would be the same for Defendants.

Comity

23. In *Watson v. Blakely*, 106 N.M. 687, 690, 748 P.2d 984, 987 (Ct.App.1987), *overruled on other grounds by Kelly Inn No. 102 Inc. v. Kapnison*, 1135 N.M. 231, 239, 824 P.2d 1033, 1041 (1992), the Court said: -

> Under the doctrine of comity, state courts recognize foreign judgments where the proceedings on which the judgment is based are not contrary to the public policy of the forum, where the judgment sought to be recognized was rendered under circumstances wherein the foreign court had jurisdiction over the subject matter and the parties, and where the parties were given an opportunity for a full and fair hearing on the issues.

24. As we have determined, civil jurisdiction over the activities of non-Indians, engaged in pursuant to consensual commercial or contractual arrangements on reservation lands, presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. *Strate*, 117 S.Ct. at 1413; *LaPlante*, 480 U.S. at 18. Punitive damages are a matter for civil law. The Navajo Tribal Court therefore had subject matter jurisdiction on the question of punitive damages in this case. As for personal jurisdiction, Defendants were properly served with process, but chose to default, thereby declining the opportunity to be heard. Defendants do not argue any facts in the record to show the Navajo Tribal Court lacked personal jurisdiction over them. Nor do they allege extrinsic fraud in the way Plaintiffs' obtained personal jurisdiction over them. We therefore conclude

that the Navajo Tribal Court had both personal and subject matter jurisdiction in Defendants' case.

25. Imposition of punitive damages, furthermore, in a case such as this, is perfectly consistent with New Mexico public policy. *See Green Tree Acceptance, Inc.*, 108 N.M. at 174, 769 P.2d at 87. It follows that there is no reason to withhold comity from the Navajo Tribal Court's decision to grant punitive damages to Plaintiffs. We therefore hold that the Navajo Tribal Court's decision granting Plaintiffs punitive damages for the wrongful repossession of their car by Defendants is entitled to comity.

CONCLUSION

26. The district court erred in refusing to enforce the Navajo Tribal Court judgment granting Plaintiffs punitive damages against Defendants on the grounds that the tribal court lacked jurisdiction. We therefore reverse the order of the district court vacating the Navajo Tribal Court's award of punitive damages and remand with instructions for the district court to enforce the entire judgment.

27. **IT IS SO ORDERED.**

/s/ Lynn Pickard
LYNN PICKARD, Judge

I CONCUR:

/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

RICHARD C. BOSSON, Judge (specially concurring)

BOSSON, Judge (specially concurring)

28. I concur in the opinion of the Court and write separately only out of concern for what I regard as dubious authority accredited to *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975). The question whether tribal laws and judgments should be analyzed under statutory full faith and credit, or under the more flexible principle of comity, is far from settled nationwide. Although *Jim* appears to grant statutory full faith and credit to tribal laws, its actual holding is far narrower and there is little discussion of this complex issue. Scholarly commentary places that conclusion in doubt. As former Professor, now Judge, Canby writes: "Despite some argument over the matter, it is probable that tribal court judgments do not fall within that terminology," referring to full faith and credit. William C. Canby, Jr., *American Indian Law* 173 (2d ed. 1988); *see Felix S. Cohen, Handbook of Federal Indian Law* 385 (1982); Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L.Rev. 133 (1977). The more persuasive authority seems to prefer comity, in part because of the greater flexibility it affords both state and tribal courts. As much as this Court is obliged to follow *Jim* and its progeny, I would urge our Supreme Court to undertake a fresh examination of this issue, probably in another case with a more informative record, in light of more recent authority and changing state-tribal dynamics. Our state is ill-served by looking only to the past for guidance on this important issue that poses perplexing challenges for our judiciary well into the future.

/s/ Richard C. Bosson
RICHARD C. BOSSON, Judge

ELEVENTH JUDICIAL DISTRICT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

WILSON HALWOOD, JR.
and LORENA HALWOOD,

Plaintiffs,

vs. No. CV-95-230

COWBOY AUTO SALES, INC.
and BRUCE WILLIAMS,

Defendants.

ORDER GRANTING FULL FAITH AND CREDIT TO FOREIGN JUDGMENT FROM THE DISTRICT COURT OF THE NAVAJO NATION

(Filed May 27, 1997)

THIS MATTER comes before the Court on the Remand from the New Mexico Court of Appeals, Docket No. 17,566.

1. The Plaintiffs had filed a certified copy of the foreign judgment entered in *Wilson Halwood, Jr. and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce Williams*, No. CH-CV-71-91 from the District Court of the Navajo Nation, Chinle, Arizona, for enforcement pursuant to MNSA 1978, Section 39-4A-3.

2. The tribal court lawsuit alleged unlawful and tortious conduct by the Defendants for illegal repossession of the Plaintiff's vehicle which was committed on the Navajo reservation.

3. The trial judgment awarded actual damages for the torts of conversion ($3,000.00) and trespass

($1,000.00), plus punitive damages of $25,000.00. It also awarded statutory damages ($425.10) for violation of Navajo Tribal Code, costs ($43.55), attorney's fees ($1,620.00), prejudgment interest ($189.56), and post-judgment interest at 10%.

4. The punitive damages were assessed because in at least two prior actions the Defendants had been found guilty in tribal court of violating 7 N.T.C. Section 607, the tribal repossession law, and further, because the Defendants had willfully, wantonly, and deliberately violated the rights of WILSON HALWOOD, JR. and LORENA HALWOOD.

IT IS THEREFORE ORDERED:

1. The civil laws of the Navajo Tribe are entitled to full faith and credit in the courts of New Mexico *Jim v. CIT Financial Services Corporation*, 87 N.M. 362, 533 P.2d 751 (1975), and the judgment for actual damages, statutory damages, costs, attorney's fees and interest, as well as punitive damages, is enforceable.

2. The entire tribal judgment is hereby granted full faith and credit and is enforced.

/s/ Joseph Rich
JOSEPH L. RICH
DISTRICT JUDGE

STATE OF NEW MEXICO
ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY

WILSON HALWOOD, JR. and LORENA HALWOOD,
Plaintiffs,

v. No. CV 95-230

COWBOY AUTO SALES, INC. and BRUCE WILLIAMS,
Defendants.

ORDER GRANTING FULL FAITH AND CREDIT TO JUDGMENT AND VACATING PUNITIVE DAMAGES IN FOREIGN JUDGMENT FROM THE DISTRICT COURT OF THE NAVAJO NATION

(Filed May 13, 1996)

THIS MATTER comes before the Court on the Defendant's Motion to Dismiss the punitive damages awarded the Plaintiffs as part of a foreign judgment entered by the District Court of the Navajo Nation. The Court having reviewed the briefs of counsel and being otherwise fully advised in the premises, FINDS

1. WILSON HALWOOD, JR. and LORENA HALWOOD are enrolled members of the Navajo Tribe.

2. COWBOY AUTO SALES, INC. and BRUCE WILLIAMS are not members of the Navajo Tribe.

3. The Plaintiffs have filed a certified copy of the foreign judgment entered in *Wilson Halwood, Jr. and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce Williams*, No. CH-CV-71-91 from the District Court of the Navajo Nation, Chinle, Arizona, for enforcement pursuant to NMSA 1978, Section 39-4A-3.

4. The tribal court lawsuit alleged unlawful and tortious conduct by the Defendants for illegal repossession of the Plaintiffs' vehicle which was committed on the Navajo reservation.

5. The trial judgment awarded actual damages for the torts of conversion ($3,000.00) and trespass ($1,000.00), plus punitive damages of $25,000.00. It also awarded statutory damages ($425.10) for violation of Navajo Tribal Code, costs ($43.55), attorney's fees ($1,620.00), prejudgment interest ($189.56), and post-judgment interest at 10%.

6. The punitive damages were assessed because in at least two prior actions the Defendants had been found guilty in tribal court of violating 7 N.T.C. Section 607, the tribal repossession law, and further, because the Defendants had willfully, wantonly, and deliberately violated the rights of WILSON HALWOOD, JR. and LORENA HALWOOD.

BASED ON THE FOREGOING the Court CONCLUDES

1. The civil laws of the Navajo Tribe are entitled to full faith and credit in the courts of New Mexico, *Jim v. CIT Financial Services Corporation*, 87 N.M. 362, 533 P.2d 751 (1975), and the judgment for actual damages, statutory damages, costs, attorney's fees and interest is enforceable.

2. Because of the penal nature of punitive damages, the District Court of the Navajo Nation is without jurisdiction to impose punitive damages on a non-member of

the Navajo Tribe. *See Oliphant v. Suquamish Tribe*, 435 U.S 101, 55 L.Ed.2d 209, 98 S.Ct. 1011 (1978).

3. The part of the tribal judgment awarding punitive damages in the amount of $25,000.00 should be vacated.

IT IS THEREFORE THE ORDER OF THE COURT that the part of the tribal judgment awarding punitive damages in the amount of $25,000.00 be, and hereby is, vacated.

IT IS FURTHER THE ORDER OF THE COURT that the tribal judgment for actual damages, statutory damages, costs, attorney's fees and interest be, and hereby is, granted full faith and credit.

/s/ Joseph L. Rich
Joseph L. Rich
District Judge

IN THE DISTRICT COURT OF THE NAVAJO NATION
CHINLE, ARIZONA

WILSON HALWOOD JR., and LORENA HALWOOD, Plaintiffs,	)	No. CH-CV-71-91
v.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**
COWBOY AUTO SALES, INC., and BRUCE WILLIAMS Defendants.	)	

Pursuant to Rule 55(b)(2)(ii), Nav. R. Cir. P., a hearing on Plaintiffs Lorena and Wilson Halwoods' Motion for Default Judgment was held on January 14, 1992, in the District Court of the Navajo Nation, Chinle, Arizona, the Honorable Wayne Cadman presiding. Timothy A. Heydinger of DNA-People's Legal Services, Inc., appeared as counsel with and for the Plaintiffs. Defendant Cowboy Auto Sales, Inc. (Cowboy Auto) and Defendant Bruce Williams (Williams) received proper notice of the hearing, but failed to appear.

This Court, having considered the pleadings on file and the evidence presented at hearing, now makes and enters the following Findings of Fact, Conclusions of Law, and Judgment.

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

Plaintiffs Lorena and Wilson Halwood initiated this action against Cowboy Auto and Williams by filing a complaint for illegal repossession, trespass, and conversion on June 19, 1991. The Halwoods' prayer for relief included claims for statutory damages for illegal repossession, damages for the fair market value of the Halwoods' converted vehicle, damages to the Halwoods' realty caused by the Defendants' trespass, punitive damages, pre- and post-judgment interest, and attorney's fees and costs. The Halwoods' complaint alleged that the Defendants were jointly and severally liable for their injuries and damages.

Each Defendant was properly served with the complaint and a summons on June 26, 1991, by a private process server registered with this Court. This process server, Mr. Roy Stratton, is over the age of eighteen (18) and not a party to this action.

The Defendants failed to plead or otherwise respond to the Plaintiffs' complaint within the time proscribed by law. On August 5, 1991, Plaintiffs made a Motion for Entry of Default against the Defendants. Plaintiffs served Defendants with a copy of this Motion. Notice of Default was sent to Defendant Cowboy Auto on August 5, 1991, and Notice of Default was sent to Defendant Williams on August 19, 1991. Each notice informed the respective Defendant that, if no response was made within 10 days, the Court would make an Entry of Default against them.

Both Defendants failed to respond to the Motion for Entry of Default and Notice of Default. This Court made an Entry of Default against Defendant Cowboy Auto on August 26, 1991, and against Defendant Williams on September 11, 1991.

Plaintiffs made a Motion for Judgment by Default on October 18, 1991. Defendants were served with a copy of this Motion. The hearing on Plaintiffs' Motion for Judgment by Default was originally scheduled for November 19, 1991. Defendants received proper notice of this hearing.

Plaintiffs motioned the Court to continue the November 19th hearing. Defendants received proper notice of this Motion, but made no response. This Court granted Plaintiffs' Motion for a Continuance, and the hearing was rescheduled for January 14, 1992. Defendants received proper notice of the January 14th hearing but once again failed to respond, and did not appear at this hearing.

B. THE MERITS OF THE CASE

By allowing a Default to be entered against them, Defendants have admitted as true the factual allegations in the Plaintiffs' complaint. This Court now adopts those factual allegations as true. The facts of this case are relatively simple and straightforward.

Lorena and Wilson Halwood are enrolled members of the Navajo Tribe and at all times relevant to this action have resided within the exterior boundaries of the Navajo Nation. Defendant Cowboy Auto is a New Mexico corporation with its primary place of business in Gamerco,

New Mexico. Cowboy Auto conducts business on the Navajo Reservation.

Defendant Williams is a member of the Board of Directors and President of Cowboy Auto. Williams is also the registered agent for service of process for Cowboy Auto, as well as a salesperson for Cowboy Auto. Williams was at all relevant times acting in both his personal and professional capacities, and all acts complained of were done at Williams direction, and with his knowledge and consent.

On November 2, 1989, Plaintiffs purchased a used 1981 Chevrolet Citation from Cowboy Auto. Williams personally sold the vehicle to the Halwoods, and signed the retail installment contract on behalf of Cowboy Auto. Under the terms of the contract entered into between the parties, Plaintiffs purchased the vehicle for $3,295.00. Plaintiffs made a $700.00 downpayment, and Defendants financed the remaining balance ($2,595.00) at a fixed rate of interest of ten percent (10%) annually. The resulting finance charge under the terms of the contract was $165.60. Plaintiffs purchased this vehicle primarily for their personal, family, and household purposes and at all times subsequent to the purchase used the vehicle for their personal, family, and household purposes.

On November 30, 1990, the Defendants repossessed the Halwoods' vehicle from their residence near Chinle, Arizona, and removed it from the territorial jurisdiction of the Navajo Nation. The Halwoods' were not at home at the time of the repossession. The Defendants repossessed the Plaintiffs' vehicle without first obtaining the Plaintiffs' written consent to the repossession, or a valid

Navajo Nation tribal court order permitting the repossession.

At hearing there was uncontroverted evidence that Defendants entered onto Plaintiffs' realty without Plaintiffs' consent and against Plaintiffs' will to remove the vehicle. Both Lorena and Wilson Halwood testified that the vehicle was parked adjacent to their residence, and that there was no possible way for Defendants to remove the vehicle without entering onto their realty. Both Plaintiffs testified that the only noticeable damage to their realty was tire tracks in the dirt.

The next day the Halwoods' verified that Defendants had taken their vehicle. Plaintiffs subsequently demanded that Defendants return their vehicle to them. Defendants refused, despite the fact that they knew their possession of the Halwoods vehicle was illegal. Defendants have since sold Plaintiffs' vehicle to an unknown third party.

Plaintiffs presented sufficient and uncontroverted evidence at hearing showing that the fair market value of their vehicle at the time Defendants' took it was $3,000.00. Plaintiffs purchased the vehicle for $3,295.00, and both Mr. and Ms. Halwood testified to numerous improvements they made to the vehicle, including a new AM/FM cassette stereo, new tires, new exhaust, and repairs to the interior of the vehicle. Ms. Halwood testified that the improvements alone totalled approximately $1,300.00. Accordingly, this Court finds that the fair market value of Plaintiffs' vehicle at the time Defendants took the vehicle was $3,000.00.

There is no doubt that, at the time the Defendants repossessed the Halwoods vehicle and subsequently sold it to a third party, Defendants knew the Navajo Nation's laws regarding repossessions. Cowboy Auto has been sued no less than twice before for illegal repossession, and Williams at least once. However, because of the relationship between Cowboy Auto and Williams, this Court finds that any knowledge attributable to Cowboy Auto must be imputed to Williams, and vice versa.

II. CONCLUSIONS OF LAW

The Defendants caused an event to occur within the exterior boundaries of the Navajo Nation by taking the Halwoods' vehicle from their home near Chinle. Accordingly, this Court has jurisdiction over the parties and subject matter of this action pursuant to 7 N.T.C. §253(2) and 7 N.T.C. §254. The requirements of due process, as mandated by the Indian Civil Rights Act, 25 U.S.C. §1301 *et. seq.*, and the Navajo Nation Bill of Rights, 1 N.T.C. § *et. seq.*, have been met. Defendants were properly served with the summons and complaint, and have received notice of every motion and entry made against them. Plaintiffs have strictly complied with every provision of the Navajo Rules of Civil Procedure, including Rule 55 (discussing Default Judgments). Accordingly, Plaintiffs are entitled to a Default Judgment against the Defendants.

Under Navajo Nation law, the personal property of Navajo Indians may be repossessed and removed from the territorial jurisdiction of the Navajo Nation only if the purchaser consents in writing to the repossession at the

time the repossession is sought, or the creditor first obtains a valid tribal court order. 7 N.T.C. §607. A person's failure to comply with this Code section is deemed a breach of the peace. 7 N.T.C. §609. Defendants failed to obtain the Halwoods' written consent or a valid tribal court order before repossessing the Halwoods' vehicle. Defendants' repossession of Plaintiffs' vehicle from within the exterior boundaries of the Navajo Nation violated 7 N.T.C. §607.

Plaintiffs are entitled to recover statutory damages in an amount equal to the credit service charge plus 10% of the principal amount of the debt. 7 N.T.C. §609. In this case, the credit service charge under the terms of the contract was $165.60, and 10% of the principal amount of the debt equals $259.50. Accordingly, Plaintiffs are entitled to statutory damages in the amount of $425.10.

Because Defendants failed to comply with Navajo Nation repossession laws, their possession of the Halwoods' vehicle was illegal from the outset. This finding is exacerbated by the fact that Defendants knew the law regarding repossession, and knew their possession was illegal. Nonetheless, Defendants converted the Halwoods' vehicle by refusing to return it to them on demand, and subsequently selling it to a third party. The Halwoods are entitled to recover the fair market value of their vehicle at the time of the conversion, which this Court finds to be $3,000.00.

Defendants took the Halwoods' vehicle by trespassing onto the Halwoods' land without their permission and against their will. Defendants did so with the intent of causing injury to the Plaintiffs. Although the damage

was minimal, damage is presumed merely from the fact that Defendants trespassed onto the Halwoods' property. *England v. Hing*, 105 Ariz. 65, 459 P.2d 498 (1969); *North v. Public Service Co. of New Mexico*, 94 N.M. 246, 608 P.2d 1128 (Ct. App. 1980). Plaintiffs are entitled to recover for the damage Defendants caused to their realty. This Court awards the Plaintiffs $100.00 for the illegal trespass.

The Halwoods have also asked for prejudgment interest on the statutory damages and the value of their converted vehicle, as well as attorney's fees and costs. An award of prejudgment interest is within the sound discretion of the trial court, *In the Matter of the Estate of: Joe Thomas*, 5 Nav. R. 232, 235 (Window Rock Dist. Ct. 1986). Navajo Nation Courts may award prejudgment interest where the amount of damages are for a sum certain, or for a sum that can be proved with reasonable certainty. *Navajo Tribe v. Yellowhorse & Jones*, 5 Nav. R. 235 (1979).

This Court finds that an award of prejudgment interest on the statutory damages and the fair market value of the Halwoods' vehicle is proper. Statutory damages under 7 N.T.C. §609 is a sum certain ($425.10), and it is uncontested that the fair market value of Plaintiffs' vehicle at the time of the conversion was $3,000.00. Accordingly, this Court awards Plaintiffs $23.53 in prejudgment interest on the statutory damages and $166.03 in prejudgment interest of the fair market value of Plaintiffs' converted vehicle.[1]

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[1] Plaintiffs asked for prejudgment interest at a rate of 10% from the date the complaint was served on the Defendants. In determining the amount of pre-judgment interest, this Court adopts the formula used in *In the Matter of the Estate of: Joe*

As for the attorneys fees and costs, it is the general rule that each party is responsible for their own attorney's fees unless the court finds that special circumstances exist. *Hall v. Arthur,* 3 Nav. R. 35 (1980); *John v. Herrick,* 5 Nav. R. 129 (1987). Navajo Nation Courts must exercise restraint in finding special circumstances, and thus creating exceptions to the general rule. *John v. Herrick, Id.,* 5 Nav. R. at 132. However, "[t]his does not mean that in an appropriate case, supported by sound reasoning, [a] Court cannot create another exception." *Id.*

This Court finds that special circumstances exist in the present case to support an award of attorney's fees to the Plaintiffs. This Court cannot state strongly enough that Defendants knew the law, but chose to ignore it. Defendants have been sued before on virtually identical fact patterns. One case introduced into evidence at trial, *Cadman v. Cowboy Auto Sales, Inc.,* No. WR-CV-59-88 (1988) included not one, but three named Plaintiffs. This case could have been avoided had Defendants complied with the law instead of blatantly taking matters into their own hands in wanton violation of the Halwoods' rights. Accordingly, based on the evidence submitted at the hearing on Plaintiffs' Motion for Judgment by Default, this court awards Plaintiffs $1,620.00 in attorneys fees, such sum representing eighteen (18) hours of work at $90.00 per hour. In addition, Plaintiffs as the prevailing

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Thomas, 5 Nav. R. 232, 235 (Window Rock Dist. Ct. 1986). As stated in that case, prejudgment interest is computed as follows:

> interest rate X principal/365 x number of days since complaint served.

party are awarded their costs in maintaining this suit, such costs totalling $43.55.

Finally, Plaintiffs have asked this Court for an award of punitive damages. "Punitive damages do not compensate for an injury, but rather are used to punish bad conduct and deter similar conduct in the future." *Chavez v. Tome*, 5 Nav. R. 183, 191 (1987). Navajo Nation courts may order a Defendant to pay punitive damages where the injury was knowingly and deliberately inflicted, or when the Defendant "acted through ill will, malice, evil motive, oppressive conduct or that he acted in such wanton and reckless way as to show a disregard of the rights of others." *Deal v. Blatchford*, 5 Nav. R. 159, 162 (1982). In deciding whether to award punitive damages, and the amount of the award, the Court may consider such factors as "the enormity and nature of the wrong and any aggravating circumstances." *Green Tree Acceptance, Inc. v. Layton*, 769 P.2d 84, 87 (N.M. 1989).

The present case presents an appropriate case for an award of punitive damages. This Court received into evidence certified copies of two other cases brought against Defendants for illegal repossession. *Cadman v. Cowboy Auto Sales, Inc.*, No WR-CV-59-88 (Window Rock Dist. Ct. 1988); *Johnson v. Cowboy Auto Sales, Inc.*, No. CP-CV-22-90 (Crownpoint Dist. Ct. 1990). As stated, the *Cadman* case included three named Plaintiffs, showing that Defendants had illegally repossessed vehicles from three Navajo individuals in that case alone. Based on the *Cadman* case, the honorable Judge Loretta Morris imposed punitive damages against Cowboy Auto in the *Johnson* case. Both of these cases involved fact patterns almost identical to the instant case.

The Navajo Tribal Code protects a creditor's security interest in goods by providing lawful means for repossessing personal property. Defendants know Navajo Nation laws regarding repossession and conversion, but have chosen once again to ignore these laws and the rights of the people of the Navajo Nation. Defendants refused to return the vehicle to the Halwoods, and sold it to an unknown third party, in blatant disregard of the Halwoods rights, and knowing that their actions were illegal. Defendants willful, deliberate, and repeated oppressive conduct will no longer be tolerated. Accordingly, this Court awards the Plaintiffs punitive damages in the amount of $25,000.00

The only issue left to be discussed is joint and several liability. There appears to be no Navajo Nation case law, and the Tribal Counsel has passed no statutes, discussing joint and several liability. Joint and several liability is a concept foreign to Navajo custom. Where a gap in Tribal law or custom exists, and there is no applicable federal law (there is no applicable federal law in this case), Navajo Nation courts may turn to "the laws of the state in which the matter in dispute may lie" for guidance. 7 N.T.C. §204 (1984-1985 Supp.). See also, *Johnson v. Johnson*, 3 Nav. R. 5 (1980).

Traditionally, joint and several liability might attach in any of several ways. However, as a public policy measure, Arizona and New Mexico have limited the scope of joint and several liability by statute. In Arizona, joint and several liability attaches only if "both parties were acting in concert or if a person was acting as an agent or servant of the other party." A.R.S. §12-2506 (West Supp. 1991). New Mexico, on the other hand, permits

joint and several liability only if the Defendants acted with the intent of inflicting injury or damage, if the relationship of the Defendants were such that one Defendant is vicariously liable for the other, in products liability cases, and in situations "not covered by any of the foregoing and having a sound basis in public policy." N.M. Stat. Ann. § 41-3A-1 (1989 Repl. Pamp.). Both states permit joint and several liability in cases involving hazardous wastes, which is clearly beyond the scope of the present case.

In the present case, Williams and Cowboy Auto were acting in concert (since Williams was acting in his personal capacity in conjunction with Cowboy Auto), and Cowboy Auto is vicariously liable for Williams' acts (since Williams was also acting in his professional capacity as an employee of Cowboy Auto). Because Defendants knew their actions were illegal, it follows that the Defendants were acting with the intent of inflicting injury to the Halwoods. The injuries suffered by the Halwoods are indivisible and cannot be apportioned between the Defendants.

As discussed above, Williams and Cowboy Auto were acting in concert, Cowboy Auto is vicariously liable for Williams' actions, and both Defendants acted with the intent of inflicting injury. If only one of these factual situations were present, this Court would possibly hold the Defendants jointly and severally liable. However, this Court need not address that issue at this time, as all three bases for imposing joint and several liability exist in this case. It is obvious that, if the Court were to adopt either Arizona or New Mexico law, the Defendants would be jointly and severally liable.

This Court finds that Navajo Nation Courts may hold defendants jointly and severally liable in proper cases. Without specifically adopting the approach taken by either Arizona or New Mexico, but instead using those state statutes for guidance, this Court holds that this is a proper case for holding the Defendants jointly and severally liable for all damages. Accordingly, the Defendants are jointly and severally liable for all injuries and damages suffered by the Halwoods.

III. JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Judgment by Default be entered in favor of Plaintiffs Lorena and Wilson Halwood against Defendants Cowboy Auto Sales, Inc. and Bruce Williams.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants shall pay the Plaintiffs $425.10 in statutory damages as provided under 7 N.T.C. §609;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants shall pay the Plaintiffs $3,000.00 for the fair market value of Plaintiffs' vehicle at the time of Defendants conversion of Plaintiffs' vehicle;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants shall pay to Plaintiffs $100.00 for damages caused to Plaintiffs' realty by Defendants' trespass;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants shall pay to Plaintiffs

$25,000.00 in punitive damages for Defendants' willful, wanton, and deliberate violation of Plaintiffs' rights;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants shall pay to Plaintiffs $23.53, such sum representing the prejudgment interest on Plaintiffs' statutory damages from the date the complaint was served on Defendants;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants shall pay to Plaintiffs $166.03, such sum representing the prejudgment interest on the fair market value of Plaintiffs converted vehicle from the date the complaint was served on Defendants;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants shall pay to Plaintiffs $1,620.00, such sum representing the fees of Plaintiffs' counsel;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants shall pay to Plaintiffs $43.55, such sum representing Plaintiffs costs in maintaining this suit;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Judgment shall accrue interest at a rate of ten percent (10%) from the date this judgment is entered until Defendants satisfy this judgment in full;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants are jointly and severally liable to Plaintiffs for the Plaintiffs' injuries and damages.

DATED: January 28, 1992

/s/ Wayne Cadman
JUDGE, NAVAJO NATION
DISTRICT COURT

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
August 24, 1998

No. 25,294

WILSON HALWOOD, JR. and LORENA HALWOOD,

Plaintiffs-Respondents,

vs.

COWBOY AUTO SALES, INC., and BRUCE WILLIAMS,

Defendants-Petitioners.

This matter coming on for consideration by the Court upon Petition for Writ of Certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE IT IS ORDERED that the petition for writ of certiorari is **denied** in Court of Appeals number **19008**.

C.I.R.C.A.
CENTER FOR INDIVIDUAL RIGHTS AND
CONSTITUTIONAL ACCOUNTABILITY
505 Marquette Avenue, NW, Suite 1620
Albuquerque, NM 87102
(505) 242-4722, (505) 244-1516 (fax)

October 27, 1998

The Honorable Joseph L. Rich
11th Judicial District Court
201 Hill Street, Room 4
Gallup, NM 87301

Dear Judge Rich:

I am currently drafting the Petition for Writ of Certiorari to the United States Supreme Court for *Wilson Halwood, Jr. and Lorena Halwood v. Cowboy Auto Sales, Inc. and Bruce Williams*, No. CV-230-11. It has come to my attention through another case in Arizona that New Mexico has entered agreements with the Navajo Nation which alter the Due Process rights of individuals. I am therefore formally requesting the disclosure of any past, present and proposed agreements between the 11th Judicial District Courts and the Navajo Nation, the New Mexico Court of Appeals and the Navajo Nation, and/or the State Supreme Court and the Navajo Nation. If these agreements do exist, they are missing from the record proper. It appears from the following information that agreements between the New Mexico Courts and the Navajo Nation have been entered.

Based on an administrative record submitted in *Hopi Tribe v. Federal Highway Administration*, CV-98-1061-PCT-EHC in the Federal District Court of Arizona, the State of

New Mexico initiated entering agreements with the Navajo Nation on all highway projects in Arizona and New Mexico. These agreements grant the Navajo Nation total authority in designating contractor obligations. According to the administrative record, the agreements were entered into pursuant to an expanded bureaucratic view of the federal mandate standard of Sec. 106 of the National Historic Preservation Act (NHPA). Specifically, "Nevertheless, if a State wishes to more broadly assert control to contractor activities only indirectly within its control, it need not be prevented from doing so." (The record can be produced if requested. It is more than 400 pages in length.)

The Indian Child Welfare Act (ICWA) of 1978, 92 Stat. 3069, requires the granting of full, faith and credit in Sec. 101, and allows the entering of agreements between state courts and tribal courts under Sec. 109. The New Mexico Family Courts use the ICWA for *all* child custody proceedings in New Mexico. *New Mexico ex rel. Human Services Dep't v. Barela,* 117 N.M. 526, 873 P.2d 272 (Ct.App.1994). This is not legally possible without some purported extension or diminishment of state jurisdiction through a federal act. Such agreements may even include actual retrocessions of state jurisdiction to the Secretary of interior pursuant to Sec. 108 of the ICWA.

The same federal bureacratic standard applied to the ICWA which applies to the NHPA could result in a state court or courts entering an agreement(s) granting full, faith and credit to all Navajo Court decisions while obliterating any territorial boundary at the state line with Arizona. Such agreements would explain the results in all

three cases where Bruce Williams was a litigant against Navajo individuals.

In order to properly present this case to the United States Supreme Court, it must be disclosed whether such agreements altering the jurisdiction of the New Mexico Courts which heard this case exist with the Navajo Nation. If the agreements exist or did exist, they should be made a part of the record proper of this case to allow the United States Supreme Court to review the constitutionality of state courts hearing cases to which they have secretly altered their jurisdiction by agreement.

If such state/tribal court agreements do not and never have existed, a letter saying there are no such agreements from this Court is sufficient to complete the Petition for Writ of Certiorari.

Thank you for your assistance in investigating this matter.

Sincerely yours,

/s/ Lana E. Marcussen
Lana E. Marcussen

CC: Richard Feferman

Supreme Court, U.S.
FILED
JAN 22 1999
CLERK

No. 98-858

In The

Supreme Court of the United States

October Term, 1998

COWBOY AUTO SALES, INC. and
BRUCE WILLIAMS,

Petitioners,

v.

WILSON HALWOOD, JR., and
LORENA HALWOOD,

Respondents.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
For The State Of New Mexico**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is not the case that is described and argued in the Petition for Writ of Certiorari. Petitioners seek review of a decision that became final more than one year ago, but even their arguments directed at that decision are misguided. Moreover, both that earlier decision and the more recent decision of the New Mexico Court of Appeals of which Petitioners purport to seek review rest on independent and wholly adequate state law grounds. This Court thus lacks jurisdiction to grant review here.

Respondents originally filed this action in New Mexico District Court, seeking enforcement of a Navajo Tribal Court judgment awarding compensatory and punitive damages against Petitioners for wrongful repossession of Respondents' vehicle from Respondents' residence on the Navajo Indian Reservation.[1] The district court enforced the compensatory damages portion of the Navajo judgment, but declined to enforce the punitive damages portion, and Respondents appealed. The New Mexico Court of Appeals, in an opinion issued on May 20, 1997, held that "New Mexico courts should recognize such [punitive damage] judgments from tribal courts under the doctrine of full faith and credit *or comity*." *Halwood v. Cowboy Auto*

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[1] The underlying case was merely a civil case for statutory and punitive damages. Petitioners' claim that Respondents "allege criminal violations by" Petitioners, Petition at 13, is thoroughly false. Similarly, Petitioners' assertion that the Navajo court awarded punitive damages "without any presentation of evidence," Petition at 2, is belied by the detailed Navajo court decision itself, App. 29-43, which specifically refers to evidence that the court considered that justified the punitive damages award. App. 38-39.

Sales, 124 N.M. 77, 78, 946 P.2d 1088, 1089 (Ct.App.1997) (*"Halwood I"*) (emphasis added). App. 10. The Court of Appeals specifically approved the enforcement of punitive damages in *Halwood I*, holding that "Imposition of punitive damages, furthermore, in a case such as this, is perfectly consistent with New Mexico public policy." App. 22. The New Mexico Supreme Court denied certiorari by order entered on September 24, 1997. App. 7. (*And see* App. 6, the Supreme Court's Order denying Petitioner's motion for reconsideration of the denial of certiorari.) Those decisions have long since become final.

On remand, the state district court issued an order enforcing the Navajo Tribal Court judgment in its entirety. App. 24-25. Petitioners appealed that order to the New Mexico Court of Appeals, which affirmed in an unpublished memorandum decision (*"Halwood II"*). It is the second decision of the Court of Appeals of which review is supposedly sought by this Petition, but Petitioners' arguments are directed almost entirely at the first decision.

SUMMARY OF THE ARGUMENT

Petitioners actually seek review of a decision in *Halwood I* that became final more than one year ago. The question of whether the state court can enforce the punitive damages aspect of a Navajo Tribal Court judgment was not decided in *Halwood II*. This Court's Rule 13 and 28 U.S.C. Section 2101(c) preclude such efforts at backdoor review of long-final state court decisions.

Petitioners also raise an issue whether the Navajo courts have the power to render a judgment against a non-Indian at all in the circumstances of this case. In the original state appeal, Petitioners did not challenge the district court's enforcement of the compensatory damages portion of the Navajo court judgment, and they acknowledged that the Navajo court had jurisdiction over them. The New Mexico Court of Appeals in *Halwood II* specifically declined to rule on those issues, and held simply that "law of the case" precludes further review.

Both the earlier decision in *Halwood I* and the more recent decision of the New Mexico Court of Appeals in *Halwood II* rest on independent and wholly adequate state law grounds. This Court thus lacks jurisdiction to grant review here.

Petitioners argue that *Montana* and *Strate* preclude Navajo Tribal Court jurisdiction over non-Indians. However, those decisions applied to privately owned land and highway rights-of-way within reservation boundaries. Neither of those decisions applies here, as the tribal land on which the petitioners' wrongful conduct occurred was land over which the tribe's proprietary and governmental powers are fully intact.

Finally, Petitioners' attack on the state court's full faith and credit ruling is not reviewable. The state appellate decision recognized that the Navajo Tribal Court judgment is fully enforceable on the alternative doctrine of comity. Comity is a matter of state law and policy consideration that is solely within the discretion of the

state courts. Therefore, this Court has no jurisdiction to review the state court decision.

ARGUMENT

I. THE DECISION OF WHICH REVIEW IS SOUGHT WAS BASED SOLELY UPON STATE LAW GROUNDS.

The decision of the New Mexico Court of Appeals in *Halwood II* does not involve an important question of federal law, as required by Rule 10 of the rules of this Court. Indeed, it involves no federal question at all, but rests entirely upon an independent and adequate state law ground. The memorandum opinion concludes "that review of Defendants' issues is precluded by the doctrine of 'law of the case.' " App. 2. The court found that both of the issues raised in *Halwood II* had been raised and decided in *Halwood I*, and it declined to review them further. The court considered each of Petitioners' arguments as to why law of the case should not be applied, and found them wanting. Under these circumstances, this Court has no jurisdiction to consider this Petition. *Coleman v. Thompson*, 501 U.S. 722, 729-730, 115 L. Ed. 2d 640, 111 S.Ct. 2546 (1991).

II. PETITIONERS' ATTEMPT TO SEEK REVIEW OF *HALWOOD I* IS PRECLUDED BY RULE 13 OF THE RULES OF THIS COURT AND BY 28 U.S.C. SECTION 2101(c).

Although technically, Petitioners' Petition is directed at the decision in *Halwood II*, it is apparent from the substance of the Petition that Petitioners are actually asking this Court to review the ruling in *Halwood I*, on the issue of whether a state court can enforce the punitive damages aspect of a Navajo Tribal Court judgment. That was not an issue that was decided in *Halwood II*, however. Indeed, Petitioners would even go further, and have this Court consider an issue that they did not even raise in *Halwood I* – whether the Navajo courts have the power to render a judgment against a non-Indian at all in the circumstances of this case. In the original appeal, Petitioners did not challenge the district court's enforcement of the compensatory damages portion of the Navajo court judgment, and they acknowledged that the Navajo court had jurisdiction over them. Petition at 3. The New Mexico Court of Appeals in *Halwood II* specifically declined to rule on those issues, and held simply that "law of the case" precludes further review. Petitioners failed to seek review of *Halwood I* in this Court, and the time for doing so is now long past. Apparently recognizing their error, they are now attempting to combine the two cases, asking this Court to reverse "*the decisions* of the New Mexico Court of Appeals." Petition at 30 (emphasis added). This Court's Rule 13 and 28 U.S.C. Section 2101(c) preclude such efforts at back-door review of long-final state court decisions.

III. PETITIONERS' ARGUMENTS BASED ON *MONTANA* AND *STRATE* ARE COMPLETELY MISPLACED.

Even were this Court inclined to overlook the fact that Petitioners seek review of a case decided more than a year and a half ago, there is nothing about the decision in *Halwood I* that warrants review. Petitioners' arguments in favor of review necessarily rely on omission or misrepresentation of crucial aspects of the factual record in this case and of the decision in *Halwood I*.

Petitioners contend that "under *Strate* and *Montana* the Navajo Tribe lacks any basis for asserting any jurisdiction over Petitioners Cowboy Auto Sales, Inc. and Bruce Williams pursuant to 7 N.T.C. Sec. 607." Petition at 7. In fact, however, this Court's decisions in *Montana v. United States*, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S.Ct. 1245 (1981) and *Strate v. A-1 Contractors*, 520 U.S. 438, 137 L. Ed. 2d 661, 117 S.Ct. 1404 (1997) have no applicability whatever to the facts of this case.

In *Montana*, this Court announced a significant exception to the general rules of tribal jurisdiction within "Indian country" (that is, for these purposes, within the exterior boundaries of a tribe's reservation) with respect to the activities of non-Indians on non-Indian-owned land within the reservation. The Court held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members," 450 U.S. at 565, but it articulated several significant limitations to that exception. It stated that:

> To be sure, *Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction*

> *over non-Indians on their reservations, even on non-Indian fee lands.* A tribe may regulate, through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe.
>
> 450 U.S. at 565-566 (citations omitted; emphasis added).

In *Strate*, a case involving a civil suit in tribal court arising from an automobile accident between two non-Indians, this Court extended the *Montana* exception. It held that tribal jurisdiction over the activities of non-Indians on a perpetual state highway right-of-way across tribal lands (at least where the tribe has not reserved its sovereign and proprietary rights in granting its consent to the right-of-way) is subject to the same limitations that apply to such jurisdiction on non-Indian fee land. The Court further held that tribal court jurisdiction over non-Indians is congruent with tribal governmental jurisdiction (the issue in *Montana*).

It is true that *Montana* and *Strate* have had a significant impact on the scope of tribal governmental and court jurisdiction over non-Indians on privately owned land and highway rights-of-way within reservation boundaries. Neither applies here, as neither *Montana* nor *Strate* purports to address tribal jurisdiction over non-Indians

on tribal land as to which the tribe's proprietary and governmental powers are fully intact. Even if those decisions were relevant to the facts of this case, moreover, their holdings would fully support the decisions in *Halwood I* and *Halwood II*.

Petitioners in this case voluntarily entered into a consensual contractual relationship with Respondent Wilson Halwood, in the form of a credit sale of a motor vehicle, knowing that Mr. Halwood was a Navajo Indian and knowing that he resided on the Navajo Indian reservation. Further, Petitioners knew that the Navajo Nation had enacted a law, codified at 7 N.T.C. Section 607, stating that repossession of secured property from lands under the jurisdiction of the Navajo Nation would be permitted only with the written consent of the debtor or by order of a Navajo Tribal Court. App. 34. The Tribal Council enacted that law precisely because of the extraordinary hardship to Navajo Indians residing on this sprawling, remote reservation, resulting from unconsented repossessions of motor vehicles. *See, Chischilly v. General Motors Acceptance Corp.*, 96 N.M. 264, 629 P.2d 340 (Ct. App. 1980), *rev'd on other grounds*, 96 N.M. 113, 628 P.2d 683 (1981); *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 551 (1975); *Babbitt Ford Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983). The record shows that Petitioners traveled onto the Navajo reservation and went to the residence of the Respondents, on tribal trust land, not non-Indian-owned fee land, and not on a highway right-of-way. There, without Respondents' written consent and without the order of any Navajo court, Petitioners repossessed the vehicle that Respondents had purchased from them. App. 32-33; 10-11. Under these

facts, nothing in *Montana* or *Strate*, imposes any limitation on Navajo court jurisdiction over Petitioners for claims arising from their actions.[2] As this Court acknowledged in *Strate*, "tribes retain considerable control over non-member conduct on tribal land." 117 S.Ct. at 1413.

Even if *Montana* or *Strate* did apply, moreover, Navajo court jurisdiction would be fully warranted in any event, both because of the consensual contractual relationship between the parties that gave rise to the repossession and also because of the importance of the Navajo repossession law to protecting the "economic security" and the "health and welfare" of members of the Tribe. The Navajo Tribal Code provided Cowboy Auto Sales a remedy and a two-level court system to enforce its security interest in the Halwoods' vehicle. Instead, Cowboy came onto the reservation and committed the torts of trespass and conversion. 7 N.T.C. § 609 provides: "Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section *is deemed to have breached the peace of the Navajo Nation*, and shall be civilly liable to the purchaser. . . . " (emphasis added).

Under the *Montana* doctrine, thus, the Tribe had full authority to exercise both regulatory and civil court jurisdiction over Petitioners with respect to this repossession, regardless of the status of the land on which it occurred.

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[2] Nor is it at all correct, as Petitioners contend, Petition at 8, that since the Navajo Tribe never adopted a constitution under the Indian Reorganization Act, the tribe has no authority to regulate the conduct of non-Indians. This Court expressly held to the contrary in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

IV. PETITIONERS' ATTACK ON THE FULL FAITH AND CREDIT HOLDING OF THE NEW MEXICO COURT IN *HALWOOD I*, EVEN WERE IT MERITORIOUS, IS NOT REVIEWABLE HERE, AS THAT DECISION TO RECOGNIZE THE NAVAJO JUDGMENT IS FULLY SUPPORTED BY AN INDEPENDENT AND FULLY ADEQUATE STATE GROUND.

Petitioners attempt to make much of the fact that the Court of Appeals in *Halwood I* rested its decision, at least in part, on the earlier decision of the New Mexico Supreme Court in *Jim v. CIT. Jim* held that the state was required to give full faith and credit to public records of the Navajo Nation under the provisions of 28 U.S.C. Sec. 1738, viewing an Indian Tribe as the equivalent of a "territory" within the language of that statute. Although there is a recent Ninth Circuit decision holding to the contrary, upon which Petitioners place great reliance, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1516 (1998), there are other cases fully supporting the New Mexico Supreme Court's view of Section 1738.[3]

Petitioners attempt to turn a simple disagreement among courts into a mammoth federal jurisdictional issue. They contend that since the place where the repossession occurred, near Chinle, Arizona, is within the

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[3] *See, e.g., In Re Adoption of Buehl*, 87 Wash.2d 647, 555 P.2 1334 (1976); *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895 (1982); *and see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 n.21 (1978); *Tracy v. Superior Court*, 168 Ariz. 21, 810 P.2d 1030 (1991); *United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100 (1856).

geographical boundaries of the Ninth Circuit, which decided *Wilson*, a New Mexico court is precluded from applying its own law to determine the enforceability of the Navajo judgment. This is a specious argument: this case was properly filed in a New Mexico court for enforcement of the Navajo judgment, because New Mexico is where Petitioners and their assets are located. New Mexico courts are entitled to make their own determination as to how to treat decisions of Navajo courts (or tribal courts located anywhere else in the country), as they choose. In doing so, they are not "extending their jurisdiction," as Petitioners claim, any more than any court does when determining whether to enforce a foreign judgment under its own rules.

More importantly, however, as is clear from the decision in *Halwood I*, and from the brief discussion of the issue in *Halwood II*, *see* App. 3, 21-22, the Court of Appeals did not solely rest its decision on the federal law issue of full faith and credit. It also held expressly that it would arrive at the very same decision on the purely state law ground of comity. Again, in this regard, its decision is supported by decisions from numerous other jurisdictions. *See, e.g., Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985); *Allen v. Industrial Commission*, 92 Ariz. 357, 377 P.2d 201 (1962); *Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982); *In Re Marriage of Red Fox*, 23 Ore. App. 393 (1975); *Fredericks v. Eide Kirchman*, 462 N.W.2d 164 (N.D. 1990). Even if this Court felt that the question of whether an Indian tribe might properly be deemed a territory within the meaning of 28 U.S.C. Section 1738 was one meriting consideration in a proper case, thus, this would not be such a case. The decision below may be

seen as resting entirely on the alternative doctrine of comity, a matter of state law and policy consideration that is solely within the discretion of state courts to determine. Again, thus, under the circumstances, this Court has no jurisdiction to consider the decision of the New Mexico Court of Appeals in *Halwood I*, even were a timely petition for review presented here.

CONCLUSION

For all of the foregoing reasons, and others, the Petition should be denied.

Respectfully submitted,

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